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REPORTS OF CASES

ARGUED AND DETERMINED IN

^{Oregon}
THE SUPREME COURT

OF THE

STATE OF OREGON,

FROM 1869 TO 1870.

AND CASES IN THE

CIRCUIT COURTS OF OREGON

FROM 1867 TO 1872.

BY JOSEPH G. WILSON,

EX-JUSTICE OF THE SUPREME COURT, AND OFFICIAL REPORTER.

VOLUME III.

SAN FRANCISCO:

A. L. BANCROFT AND COMPANY.

PUBLISHERS, BOOKSELLERS, AND STATIONERS.

1872.
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Rec. Jan. 27, 1873

ERRATA.

- On page 1, line 5 from bottom, read "Willamet."
- On page 32, line 3, read "examined."
- On pages 129 and 512, read "Hawthorne."
- On page 154, line 15, read "special."
- On page 249, line 26, read "corrections."
- On page 323, lines 20 and 24, read "majority."
- On page 332, line 10, for "mortgages" read "mortgagor."
- On page 356, line 19, read "are."
- On page 367, line 5 from bottom, read "designedly."
- On page 368, line 7 from bottom, read "circumstantial."
- On page 377, last word in syllabus, "close" instead of "clothes."
- On page 418, line 20, for "Munon" read "Mundee."
- On page 426, add "judgment affirmed."
- On page 430, line 16, for "The" read "They."
- On page 447, line 10 from bottom, read "previously."
- On page 451, line 6 from bottom, for "or that" read "by;" and line 4, insert "or that" before "the."
- On page 459, line 23, read "no" before "right."
- On page 464 line 5, read "principle."
- On page 498, line 8 from bottom, omit "borne."
- On page 515, line 3 from bottom, for "subject" read "object."
- From page 527, the cases were determined in September term, 1870, at top of page, for "1869" read "1870."
- On page 570, line 11, read "law" for "late."
- On page 570, line 6, read "11" for "1."
- On page 574, line 18, read "having" for "leaving."
- On page 582, line 7 from bottom, read "17" for "171."



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JUSTICES

OF THE

SUPREME COURT OF THE STATE OF OREGON.

IN 1868 AND 1869.

REUBEN P. BOISE, Third District.....	CHIEF JUSTICE.	
PAINE P. PRIM, First District.....	} JUSTICES.	
JOHN KELSAY, Second District.....		
WILLIAM W. UPTON, Fourth District.....		
JOSEPH G. WILSON, Fifth District.....		

IN 1870.

PAINE P. PRIM, First District.....	CHIEF JUSTICE.	
ANDREW J. THAYER, Second District.....	} JUSTICES.	
R. P. BOISE, Third District.....		
WILLIAM W. UPTON, Fourth District.....		
B. WHITTEN, Fifth District, from June to Sept. 1870.....		
L. L. McARTHUR, Fifth District, from Sept. 1870.....		

IN 1871.

PAINE P. PRIM, First District.....	CHIEF JUSTICE.	
ANDREW J. THAYER, Second District.....	} JUSTICES.	
BENJAMIN F. BONHAM, Third District.....		
WILLIAM W. UPTON, Fourth District.....		
L. L. McARTHUR, Fifth District.....		

IN 1872.

WILLIAM W. UPTON, Fourth District.....	CHIEF JUSTICE.				
PAINE P. PRIM, First District.....	} JUSTICES.				
ANDREW J. THAYER, Second District.....					
B. F. BONHAM, Third District.....					
L. L. McARTHUR, Fifth District.....					
<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 60%;">RICHARD WILLIAMS, from 1864 to 1870....</td> <td rowspan="2" style="vertical-align: middle; text-align: center;">} CLERKS.</td> </tr> <tr> <td>C. G. CURL, from 1870.....</td> </tr> </table>		RICHARD WILLIAMS, from 1864 to 1870....	} CLERKS.	C. G. CURL, from 1870.....	
RICHARD WILLIAMS, from 1864 to 1870....	} CLERKS.				
C. G. CURL, from 1870.....					

JUDICIAL DISTRICTS AND THE JUSTICES PRESIDING.

FIRST DISTRICT—The counties of Jackson and Josephine.

PRIM, C. J.

SECOND DISTRICT—The counties of Benton, Lane, Douglas, Coos and Curry.

KELSAY, J. to 1869. THAYER, J. from 1869.

THIRD DISTRICT—The counties of Marion, Linn, Polk, Tillamook and Yamhill.

BOISE, C. J. to 1871. BONHAM, J. from 1871.

FOURTH DISTRICT—The counties of Multnomah, Clackamas, Washington, Columbia and Clatsop.

UPTON, J.

FIFTH DISTRICT—The counties of Umatilla, Union, Baker, Grant and Wasco.

WILSON, J. to 1870. WHITTEN, J. to September, 1870.

McARTHUR, J. from September, 1870.

ROLL OF ATTORNEYS

ADMITTED TO THE BAR OF THE SUPREME COURT OF OREGON,
SINCE THE PUBLICATION OF VOLUME II OF
OREGON REPORTS.

SEPTEMBER TERM, 1869.

J. W. BALDWIN,
GEO. H. DURHAM,
CHARLES A. BALL,
T. CALVIN HYDE,
EARL C. BRONAUGH,
JOHN BURNETT,
J. C. MORELAND.

J. A. STRATTON,
J. L. COLLINS,
M. BAKER,
E. B. STONE,
DEWIT CLINTON JONES,
M. D. C. THORNTON,
EUGENE SULLIVAN,
ROBERT CATLIN,
H. H. NORTHRUP.

SEPTEMBER TERM, 1870.

THOMAS A. McBRIDE,
WALTER S. MOSS,
JAMES A. WAYMIRE,
JOHN B. WALDO,
THOMAS H. TONGUE,
RALEIGH STOTT,
CHAS. EDWARD WARREN,
THEODORE BURMESTER,
J. J. HENDERSON,
CHAS. GARDNER,
J. J. WHITNEY,
JOHN CREIGHTON,
S. C. WINGARD,
HUGH T. BINGHAM.

SEPTEMBER TERM, 1872.

EDSON E. CHAPMAN,
WILLIAM H. EFFINGER,
WILLIAM C. GASTON,
JOSEPH SIMON,
L. T. BARN,
TILMON FORD.
H. K. HANNA,
MORGAN A. BAKER,
J. J. DALEY,
WARREN TRUITT,
PRESLEY DENNEY,
O. F. BELL,
V. R. HYDE,
B. F. DENNISON,
W. V. SMITH,
QUINCY A. BROOKS,
ARTHUR CRISFIELD,
PETER G. KOCH,
GEO. A. LA DOW,
J. B. ONSTINE.

SEPTEMBER TERM, 1871.

JOHN H. WOODWARD,
R. O. DUNBAR,
FRANK L. STOTT,



ORGANIZATION OF THE COURTS

OF THE

STATE OF OREGON.

CONSTITUTIONAL PROVISIONS.

ARTICLE VII.

SECTION 1. The judicial power of the state shall be vested in a supreme court, circuit courts and county courts, which shall be courts of record, having general jurisdiction, to be defined, limited and regulated by law, in accordance with this constitution. Justices of the peace may also be invested with limited judicial powers, and municipal courts may be created to administer the regulations of incorporated towns and cities.

SEC. 2. The supreme court shall consist of four justices,¹ to be chosen in districts by the electors thereof, who shall be citizens of the United States, and who shall have resided in the state at least three years next preceding their election, and after their election to reside in their respective districts. The number of justices and districts may be increased, but shall not exceed five, until the white population of the state shall amount to one hundred thousand, and shall never exceed seven. ***

SEC. 5. The judge who has the shortest term to serve, or the oldest of several having such shortest term, and not holding by appointment, shall be the chief justice.

SEC. 6. The supreme court shall have jurisdiction only to revise the final decisions of the circuit courts; and every cause shall be tried, and every decision shall be made by those judges only, or a majority of them, who did not try the cause or make the decision in the circuit court. ***

SEC. 8. The circuit court shall be held twice, at least, in each year, in each county organized for judicial purposes, by one of the justices of the supreme court, at times to be appointed by law; and at such other times as may be appointed by the judges severally, in pursuance of law.

SEC. 9. All judicial power, authority and jurisdiction, not vested by this constitution, or by laws consistent therewith exclusively in some other court, shall belong to the circuit courts; and they shall have appellate jurisdiction and supervisory control over the county courts, and all other inferior Courts, officers and tribunals.

1. The number of Justices was increased to five by an act passed October 11, 1862.

RULES ADOPTED

BY THE

SUPREME COURT..

RULE 32. All business except motions to dismiss appeals, motions to perfect transcripts and motions to affirm judgments in cases where appeals have been abandoned, shall be taken up when the district is reached.

RULE 33. The argument upon a motion for any other purpose than the perfection of transcripts or dismissals of appeal for causes apparent on the transcript, will not be heard until the case is called in which the motion is filed.

RULE 36. All motions for rehearing shall be upon petition in writing, presented and filed within two days after the judgment, order, or decision of the court is announced, and within the same term. No argument will be heard thereon.

RULE 37. The page of the printed briefs required by Rule 28, must be eight and one half inches in length, and five and one half inches in width, and the outer blank margin of each page must be one and one fourth inches in width.

RULES OF THE CIRCUIT COURT,

Adopted in the Fourth Judicial District of Oregon.

1. All cases in which the answer is filed, or the time for answering expires on or before the first day of the term will be for trial at such term, and be placed on a list to be known as the trial calendar; otherwise an issue of fact will not be tried at such term, except by consent of parties.

2. A case that is for trial upon an issue of fact may, on the first day of the term, be placed at the foot of the trial calendar on the written consent of the parties, or for good cause shown by affidavit.

3. Actions that are at issue upon the facts at the time of calling the calendar on the first day of the term will be taken up and tried in the order in which they stand upon the clerk's calendar, unless otherwise specially ordered.

4. The time for the trial of criminal cases will be fixed by special order at each term.

5. After Law Cases are disposed of, issue of fact joined in Equity Cases will be heard in the same order provided for the trial of actions.

6. Issues of fact joined after the calling of the calendar, in the cases provided for in Rule 1, will, on motion of either party, be placed at the foot of the trial calendar, and will be for trial in the order in which such motions are made.

7. A motion for continuance, if the case is at issue on a question of fact, must be filed on the first day of the term, or as soon thereafter as the party moving has knowledge or information of the facts upon which the motion is to be predicated.

8. In all actions and suits wherein a defendant has appeared, the attorney, whether for the plaintiff or defendant, upon filing any pleading, or any motion in relation to a pleading, shall within the time required by law for filing such pleading or motion, serve a copy thereof on the attorney of the adverse party, if such attorney of the adverse party has an office at the county seat where the action is pending; and if such attorney has no office at the county seat, then such copy shall be left at the office of the county clerk; and if such service is omitted and default is taken or claimed, the default will be set aside upon a showing of want of knowledge of the filing of such pleading or motion.

9. Any demurrer, motion or any other question of law not involving a trial of the cause on its merits, may be brought on for hearing, by entering in the motion-book the title of the cause, the names of the attorneys, and the nature of the question involved; either party may make the entry.

10. Each Saturday during the term will be set apart for hearing demurrers, motions and questions of law, unless otherwise specially ordered. Days thus set apart are known in these Rules as "motion days." Other days besides Saturdays will be thus set apart by special order, and made motion days if the business of the term require it. The first day of each term will be a motion day, but not to the exclusion of other business.

11. To entitle a question to be heard on any motion day, except the first day of the term, it must be entered on the motion-book before noon of the day preceding such motion day. *Provided*, that motions or demurrers filed after noon of the day preceding the motion day, may, on the same day, be put on the motion-book by the adverse party, and shall then stand as other motions and demurrers, regularly on the motion-book.

12. On motion days cases will be taken up and heard, on application of either party, in the order in which they are entered on the motion-book, unless otherwise, for good cause, specially ordered.

13. If a case that is entered on the motion-book is not taken up in its order, it may, by consent of the parties, be taken up after all other cases on the motion-book have been disposed of; otherwise, it must be again set down for hearing on another motion day.

14. *Ex-parte* motions and motions for continuance will be heard on any day.

15. When a demurrer to a complaint is sustained and the plaintiff is allowed to amend, the case will stand continued for the term, at the option of the defendant.

16. When particular or special instructions to the jury are desired, the request must be presented in writing to the Judge, before the commencement of the last address of counsel to the jury.

17. So much of the foregoing Rules as relates to motion days, and to the time of hearing demurrers, motions and other questions of law, will not apply at any general or special term, at which all the civil cases pending amount to less than forty.

18. Pleadings, depositions, other written evidence and reports of referees must be written legibly, without interlineation, and the lines of each page thereof must be numbered.

19. Before any pleading is filed in a case, its name must be plainly written, either with or without abbreviation, on the margin of each page thereof.

20. And in case of depositions and other written evidence, on the margin of each page must be noted the name of the witness and the nature of the examination: that is, whether it is direct, cross or re-direct.

21. When interrogatories are written to be used in any case, the several interrogatories filed in the action or suit, and not rejected or overruled, shall be numbered consecutively in one series.

22. If any of such interrogatories are overruled by a referee, and the ruling excepted to, those so overruled shall be numbered separately.

23. If such numbering or marginal notation be omitted by the party filing the paper, it shall be done by the clerk, at the expense of the party.

24. All objections to interrogatories that shall be made before a referee, must be passed upon by the referee and the decision noted.

25. Evidence or interrogatories offered by either party before a referee, and overruled or not admitted, if the decision be excepted to, must be written on a part of the paper separate and distinct from the evidence that is deemed admissible.



CASES HEARD AND DETERMINED
IN THE
CIRCUIT COURTS
OF THE
STATE OF OREGON.

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CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1867.

THE OREGON IRON CO. *v.* JOHN C. TRULLINGER.

CONSTRUCTION.—A grant by the words, "To flow back the water to the foot of the present wheel " * * * * " and the right at all times to use all the water which naturally flows below said mill ." *Held*, to mean the water as it flows from the mill-wheel, the mill being in operation.

IDEM.—It is necessary to give consideration to all parts of a deed in order to ascertain what was the intention of the parties; and for this purpose, surrounding circumstances within the knowledge of the parties at the time should be considered.

SERVITUDES.—The purchaser of part of an estate takes it with the servitudes that are visibly attached at the time of the sale.

RIGHT TO POND WATER.—The right to use water necessarily implies a right to dam and to detain it. One exercising this right can only *detain* it. He cannot divert it. He must not detain it unreasonably, or let it off in unreasonable quantities.

IDEM.—What is unreasonable detention is, in general, a question of fact.

It appears by the pleadings, that on the twenty-sixth of January, 1864, the defendant was owner of the land over which Sucker Creek flows, from Sucker Lake to the Wallamet River, and had then a mill and dam in use on said stream, a short distance below Sucker Lake.

It was admitted on the argument, that defendant's mill was propelled by a large breast-wheel, upon which water

was then and is now discharged at different elevations, according to the stage of water and condition of the reservoir, ranging from seven feet above the natural surface of the lake, downward.

The defendant's dam was so situated as to be capable of raising Sucker Lake seven feet above its natural surface, thus creating a reservoir of eight or ten hundred acres. And the condition and construction of the defendant's mill was such that it could be properly worked when the water of the lake was drawn down to a point one or two feet above the natural surface of the lake; and the defendant's flume was so constructed that water could be drawn down to that point. There was fall enough in the creek for another water power "below the foot of the defendant's wheel."

On that day, the twenty-sixth of January, 1864, the defendant sold to H. D. Green, the plaintiff's grantor, a parcel of land lying on the creek near its mouth and below the defendant's mill, and a right of water.

The deed executed by the defendant to H. D. Green, recites that said Green "contemplates erecting stacks, furnaces and machinery for the purposes of reducing iron and other ores, for which he desired the use of the waters of the creek." These stacks, furnaces and machinery are now erected at a cost of \$100,000, or more, and belong to the plaintiff, and the machinery is propelled by the waters of the creek, the plaintiff having a dam and reservoir capable of retaining water sufficient to drive that machinery twenty-four hours, though the defendant's gates be closed. This dam does not back water so far as to the foot of the defendant's wheel. This deed conveys to Green a parcel of land near the mouth of the creek, and below the defendant's dam and mill, and it conveys the right to the water, in the following terms: "Together with all the water privilege on Sucker Creek, the outlet of Sucker Lake, which can be obtained by building a dam above the land sold, as above stated, and below the" * * * (defendant's) "mill at a point to be selected by the said Green, his heirs and assigns, he having the right, which is hereby granted, to con-

struct and maintain a dam of any length and height, and to flow back the water to the foot of the present overshot-wheel of the mill, and the right at all times to use all the water which naturally flows below said mill in said stream, unobstructed by the parties of the first part, their heirs and assigns."

It appears from the proofs and admissions, that the creek is, in the dry season, but a small stream, which in its natural condition is for a short portion of the year insufficient to drive either the mill of the defendant or the machinery of the plaintiff. And that by means of using the lake as a reservoir, and retaining water during the wet season which would be of no use at that time in propelling the machinery of either party, the value and usefulness of the stream to both parties is greatly enhanced. But that the quantity thus saved was not sufficient to fully supply either party during the last dry season. That the natural flow of the stream is liable to become too small for either, by the heat and drouth of summer, and also by hard freezing in the winter.

The plaintiff complains that during the dry weather of the past summer, the defendant has ponded the water back so as to render it impossible for the plaintiff to operate his machinery, and that the defendant has let the water down from his gates at irregular intervals, and in irregular and improper quantities, causing unnecessary waste of the water, and interruption to the plaintiff's business of smelting ores.

The plaintiff also claims, that by the construction of the deed, the defendant had no right to pond the water of Sucker Creek; but that the plaintiff has a right that it should flow at all times, as in a state of nature, to the plaintiff's reservoir, without being stopped or ponded by the defendant. The plaintiff also claims that the defendant is threatening to build his dam higher than it was at the time of executing the deed to Green, and thus to further obstruct the flow of the water.

The evidence showed that the value of the water power to each of the parties was greatly enhanced by ponding

Sucker Lake, and would be nearly worthless without it; that in dry weather the stream afforded but three to four inches of water under pressure of thirty feet; that at the date of the deed the defendant's mill required and used from thirty to sixty inches of water under thirty feet pressure; that the water required to run the defendant's mill ten hours will run the plaintiff's machinery twenty-four hours; that the defendant's mill used at that time twenty-five cubic feet per second; that running the defendant's mill twelve hours, in times of low water, will draw down the lake three fourths of an inch; that the lake, when fully ponded, is of capacity, together with the natural flow of water into it, to run the defendant's mill twelve hours a day for ten months, and that the water can be drawn down each dry season several feet without serious loss to the defendant; that during the years in which the mill has been operated, working the mill has never required the pond to be drawn down more than two feet.

Logan & Shattuck, for the plaintiff.

Mitchell & Dolph, for the defendant.

URTON, J. The principal question in this case arises upon the construction of the deed from the defendant to Green, in determining what right and privileges were conveyed.

If no reference had been made to the mill or dam, the language of the deed might be construed to convey a right to all the power afforded by the natural flow at all times. But reference in the deed to the defendant's mill-dam and wheel, confines the right to flow back the water to particular limits. And I think, upon the same principle and with equal certainty, the reference to defendant's mill and wheel limits the purchase, and reserves to the plaintiff rights that otherwise would have passed. The instrument, taken as a whole, shows the intention of the parties to have been, that the defendant should retain such right in the water as was necessary to a reasonable use of his mill. It is a pertinent matter, that the deed discloses on its face the intended use

of the water by each party. What might or might not be a reasonable use of the water by the defendant may depend very much upon the purposes to which it is to be applied by those occupying below him, especially since that purpose is expressed in the deed. Thus, if the contemplated business below required that the plaintiff be constantly supplied with a small stream, and there was no possibility of constructing reservoirs by the plaintiff to equalize the flow coming from the mill, the defendant might, in a time of scarcity, be obliged to desist from interrupting the flow, on the principle that one may not so use even his own property as to unreasonably discommode others.

The words, "The right at all times to use all the water which naturally flows below said mill," if they stood alone, might be of doubtful construction, and the whole sentence in which they occur, taken independently of the rest of the instrument, might, without much violence or strictness, be construed to convey an absolute right to have the water flow at all seasons of the year and at all hours of the day, in the precise quantity it would have flowed in a state of nature.

But it is necessary to give consideration to all parts of the instrument, in order to ascertain what was really the intent of the parties. (*Marvin v. Stone*, 2 Cow. 781.) For this purpose, the surrounding circumstances within the knowledge of the parties at the time should be considered. (*Blossom v. Griffin*, 3 Kernan, 569.)

It will be presumed that the parties were contracting with knowledge of the situation of the property; and it is evident that they did not intend to abandon the advantages derived from using the lake as a reservoir. The terms of the contract exclude the idea that the defendant was expected to abandon the use of his mill; but it seems to have been contemplated that the defendant could and would so use his mill that the flow of water below it would supply the requirements of the purchaser's business, whenever there was sufficient water. It is admitted that the plaintiff has a reservoir of sufficient capacity; that if, during each day, the defendant lets down sufficient water for the twenty-

four hours, the plaintiff can retain and use it without being injured because of temporary interruption of the flow of the stream. Accordingly, if the defendant lets down water at regular intervals in quantities such as the plaintiff is entitled to, no harm can be done by the daily closing of the gates. But the plaintiff claims that by the words "water which naturally flows," the plaintiff became entitled to all the water that would have flowed there in a state of nature; that the defendant's ponding up the water may increase the evaporation and diminish the stream. I think that construction is not a necessary import of the words used. There is something other than a state of nature contemplated and expressed when we add to the words, "the water which naturally flows," the words, "*below the mill.*" There is a difference between a grant of the "quantity of water that would flow in a state of nature" and "the quantity which naturally flows below a mill."

Had the defendant sold all the land he owned below "the foot of the wheel" down to the Wallamet River, with all its hereditaments and appurtenances, I think the purchaser would have acquired all the rights that are conveyed by this deed. But in that case the purchaser would have taken subject to all the burdens and servitudes connected with the use of the grantor's mill. "The purchaser of part of an estate takes it with the servitudes that are visibly attached at the time of the sale." (*Lampman v. Milks*, 7 Smith, 507.)

But it seems too evident, from the terms of the contract, that the parties intended a continuation of the use of defendant's mill to admit of argument. The purchaser evidently took the property subject to a right in the defendant to make such use of the lake as had been theretofore made, if not seriously detrimental to the purchaser.

And if there had been no relation of grantor and grantee, the owner of the lands above would have a right to construct a dam, and to make use of surplus water to fill the pond when the detention would not work actual injury or damage to his neighbor. "The right to use necessarily implies the right to dam and to detain the water." (*Van Hoesen v.*

Coventry, 10 Barb. 520,) "While each proprietor has a right to detain the water as it passes through his land long enough for the proper and profitable enjoyment of it; he can only *detain* it; he cannot *divert* it. (*Platt v. Johnson*, 15 John. 213, 218.)

He must not detain it "unreasonably, or let it off in unusual quantities to the annoyance of his neighbor." (3 Kent's Com. 440; *Webb v. The Portland M. Co.*, 3 Sumner, 189.)

What an unreasonable detention is, in general, a question of fact. I think it is not an unreasonable detention to fill the defendant's pond in the wet season with surplus water, that could not then be available to the plaintiff, and to discharge it in the dry season, in proper quantities, when its flow must necessarily be advantageous to the plaintiff. By unavoidable construction of the contract, the defendant has a right to use his mill, and the rule is that he must so use his property as not to injure others. He has a right at proper times to detain the surplus water by ponding the lake. I think he has by his deed limited himself to such times; and that he has no right to accumulate and retain water at times when it is needed for the use of plaintiff's works. I think he may at all times retain the water at the height at which it had been constantly retained, as indicated by the dam and flume up to the time of Green's purchase; namely, at the height of one foot above the surface of the lake; both because that was the condition of things at the time the purchase was made, and because it does not appear that such detention would make the flow of the stream, at any time of scarcity of water, materially less than it would have been had no dam been built. The plaintiff is entitled in low water to have sufficient water to drive the machinery, etc., mentioned in the deed, if the natural flow of the stream, together with surplus water used in running the mill, would produce so much, and if it would not, then so much as the natural flow of the stream would produce, and the defendant has no right to so use his dam or gates as to prevent this. This amount of water should be supplied at such intervals or with such constancy as to enable the

plaintiff, by means of his reservoir, to have the regular use of it.

(a.) The following decree was entered: It is ordered, adjudged and decreed that said John C. Trullenger is owner in fee of all the water power created, or that can be created, by the flow and fall of said Sucker Creek above said point designated as "the foot of the overshot water-wheel," and has the right to pond and raise the waters of Sucker Lake at and above his said saw-mill at all times when that can be done by means of surplus water; and that all water flowing in said creek over and above twenty-five cubic feet per second, is surplus water. And the said plaintiff is owner in fee of all the water power created, or that can be created, by the flow and fall of the said creek below said point.

It is further ordered, adjudged and decreed, that the said John C. Trullenger be and is hereby required, at all seasons of the year, to permit, at the least, as much water to flow over or through his dam, or the gates thereof, at his said saw-mill, at regular intervals of not exceeding twenty-four hours, as shall be equal to all the water that would naturally flow during the same time in said creek if no ponding or interruption existed. And whenever the water is raised or ponded in Sucker Lake so as to be more than four feet above the natural surface of said lake, said John C. Trullenger is hereby required to permit as much water so to flow in the course of each twenty-four hours as will be equal to twenty-four cubic feet per second for ten hours; that is to say, nine hundred thousand cubic feet of water during each twenty-four hours.

And it is further ordered, adjudged and decreed, that whenever said John C. Trullenger, his heirs or assigns, shall during the wet season cause the said pond, including the said Sucker Lake, to be filled and raised to its full capacity, and shall husband and use said water in a prudent manner conducive to the mutual benefit of said Trullenger and said plaintiff, said Trullenger, his heirs or assigns, shall not during such year be required to draw down said pond or lake lower than to a point four feet above the natural surface of said lake.

And it is further adjudged and decreed that the said plaintiff and the said J. C. Trullenger each pay one half the costs of this suit.

Pending this suit, an injunction was granted restraining the defendant from making certain alterations in his gates and dam, and upon the defendant's motion, the injunction was so modified "as to allow the defendant to use his saw-mill and gates as he shall desire; providing, at regular intervals, not exceeding twenty-four hours, he discharge water sufficient to supply the plaintiff's works."

The defendant was required to show cause, upon an alleged violation of the temporary injunction, and the hearing was had subsequent to the rendition of the decree, and after the close of the term.

On this hearing, it was disclosed that there were no definite monuments to indicate the point of "the natural surface of the lake," and that there was much difference of opinion among persons acquainted with the premises, as to how much of the present depth of water was artificially created. The

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1867.

F. OPITZ ET AL. v. WM. WINN.

GARNISHEE.—Where a person who is served with garnishee process voluntarily pays money to the constable, it is not error for the justice of the peace to refuse to enter an order directing the constable to pay the money to the judgment debtor, although the money may be earnings for which the justice could not lawfully enter judgment.

The facts are stated in the opinion of the court.;

UPTON, J. The defendant, Wm. Winn, obtained a writ of review, directed to Israel Graden, justice of the peace.

The justice had rendered a judgment for \$88 69 in favor of the plaintiff, against this petitioner, on October 11, 1867, and between that date and October 23, garnishee process was served on Carson and Porter. The latter answered that they had \$27, belonging to the said Winn, the petitioner; which sum they delivered to the constable, who held the execution. On the 23d, the defendant Winn filed an affidavit, stating that the \$27 was earnings of the judgment debtor, earned within thirty days next preceding *the date of the affidavit*, and demanded that the same "be exempted from execution, and that the same shall not be included in any judgment against Carson and Porter." The defendant asked the justice to make an order directing the constable to pay the \$27 to him, and the justice declined to make any order in that respect. Thereupon the defendant Winn petitioned for this writ.

The statute does not, in direct terms, affirmatively exempt "earnings;" but section 310 provides that "the earnings of a judgment debtor for personal services, at any

cause was pending on appeal to the supreme court when this source of uncertainty was made known, and to avoid the uncertainty, the supreme court so modified the decree as to fix the point to which the water should be drawn down each year, "Three and one half feet below the highest point to which the water shall have stood when the pond was so filled for such year." In other respects, the decree was affirmed.

time within thirty days next preceding a judgment against a garnishee, shall not be included in said judgment," when necessary for the support of the family, etc.

It is not claimed that the justice has rendered a judgment against the garnishees, Carson and Porter; but that he has erred in refusing to control the process of his own Court, and that he should direct the constable to deliver to the petitioner the money voluntarily paid over by Carson and Porter.

I am not prepared to say the justice has power to make such order; if the constable had made an unlawful levy, the power that a court should have to control its own process would probably be exercised by directing a discharge. But this money is voluntarily paid, its payment was not enforced by process, and it is a question yet to be settled whether its payment discharged Carson and Porter from their liability to the petitioner Winn.

A justice of the peace derives his power from the statute. The statute does not by any express words authorize him to make the order, and I think it was not error for him to decline to make it.

The petition does not show affirmatively that an error has been committed, and the writ must be dismissed.

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CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1868.

STATE OF OREGON v. JOSEPH TAYLOR.

EVIDENCE.—Where the conversations of the defendants are admissible as confessions, the whole conversation relating to the subject may be admitted.

PRIVILEGE OF WITNESS.—A witness on a former examination had made statements which were then reduced to writing; she was asked whether on that occasion she mentioned the name of one "Morris." It was not error for the court to direct that the witness be allowed to inspect the writing before answering, although it appears on inspection that the name "Morris" was not contained in the writing.

DEGREE OF CRIME.—A defendant charged with stealing from the person, may be convicted either of larceny, or of larceny from the person, if the

facts charged in the indictment are sufficient to include both degrees of crime.

M. F. Mulky, District Attorney.

Mitchell & Dolph, for the defendant.

The defendant, having been convicted of the crime of larceny from the person, moved for a new trial.

The following opinion was filed, overruling the motion.

UPTON, J. It is assigned as error that the witness, Mrs. Rolff, was allowed to state a conversation between herself and the defendant, in which she told what was said between herself and one Roberts. In detailing the latter conversation, she declared that she told the defendant that she offered said Roberts a watch, \$100, and a ticket to San Francisco, if Roberts would leave the State before this trial; and that Roberts refused to accept the offer. The defendant objected that the transaction was criminal, and that there can be no agency in the commission of crime, and Mrs. Rolff could not make the offer as the defendant's agent. I think the conversation was properly admitted, without reference to the question of agency. It was a conversation between the witness and the defendant; and the defendant's answers to the witness could not be fully understood, without giving what the witness had said to him. The evidence was material, for the purpose of showing whether or not the defendant had attempted to suppress evidence.

It is also assigned as error that the court refused to permit the defendant to cross-examine Mrs. Rolff as to her testimony on a former occasion, without permitting her to examine the written deposition taken on that occasion. The defendant admits the general rule, that a witness cannot be examined as to the contents of a written instrument, without submitting the writing for inspection, but claims that the point here made is not within the rule. He asked whether she spoke of one "Morris" on that occasion, and he now claims that the name Morris does not occur in the deposition, and claims that he was deprived of his right to test the strength of her recollection.

If this constitutes an exception to the general rule, it would follow that a witness could be asked, in regard to any supposed statement and the admissibility of the question, without an inspection, would depend on whether or not the language referred to was contained in the instrument or writing. I cannot see that the proposed question is an exception to the general rule. The foundation of the rule is, that the writing is the best evidence; and a sufficient reason for applying it to cross-examinations is, that few if any persons have memory sufficient to endure such a test as is here proposed. Besides this, it very seldom occurs, in reducing conversation or testimony to writing, that all that is said orally is placed on paper in the order in which it is uttered, and the writer does not always use the identical words uttered by the witness. It would therefore give the cross-examiner an unfair and unreasonable advantage of a witness, to permit him to examine with the writing in his hand, without permitting the witness to inspect it—and afterwards to read it to the jury as a higher class of evidence of what was said on the former occasion.

It is also assigned as error that the jury was instructed that the facts stated in this indictment were sufficient to constitute larceny from the person; and also that the facts set forth in this indictment are sufficient to include the crime of simple larceny.

There is a form given in the Code, for larceny in a dwelling, that omits] to state the value of the property stolen; and I think under that form of indictment a conviction of simple larceny could not be sustained; but if the value of the property be also alleged, the indictment will charge all the facts that constitute the latter crime. Larceny from the person is a higher degree of crime than simple larceny. This indictment charges larceny from the person, and in doing so, it charges all the facts that constitute simple larceny, and I think the latter crime is in this case necessarily included in that with which the defendant is charged.

The motion for a new trial must be overruled.

CIRCUIT COURT FOR CLACKAMAS COUNTY, MARCH TERM, 1868.

W. C. JOHNSON ET AL. v. THE CITY COUNCIL OF
OREGON CITY.

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Intangible property, not growing out of real estate, must be held to follow the person of the owner.

Its locality does not depend upon the place of the written evidence of the ownership. Where one of two co-executors resides in this State, and transacts the business pertaining to the estate, and the other resides abroad, the residence of the former will determine the *situs* of the *choses in action* belonging to the estate.

Notes and other *choses in action* belonging to citizens resident in Oregon City, are liable to taxation under the charter of Oregon City.

Johnson & McCown, for the plaintiff.

S. Huelat & B. Killin, for the defendant.

The plaintiffs are executors of the last will of W. C. Dement, deceased. J. D. Dement, one of the executors, being a resident of San Francisco, Cal., and the other, W. C. Johnson, residing in Oregon City, in this state; the latter had the personal care and management of the estate.

Some months before the time of the annual city assessment of Oregon City for 1867, the executor Johnson caused notes, mortgages, etc., payable to the executors, theretofore kept by him in Oregon City, to be placed in the hands of an agent residing outside of Oregon City; said Johnson continuing a citizen of, and to reside in, Oregon City, and still retaining power over and control of the notes, and collecting interest on them at Oregon City. The notes, notwithstanding their removal, were assessed by the assessor of Oregon City to the value of \$30,000.

W. C. Johnson, as executor, paid the tax under protest, and this action is brought to recover back the amount paid.

UPRON, J., delivered the following opinion:

The charter of Oregon City contains the following provisions: The City Council has power "to levy and collect taxes for general corporation purposes, not to exceed one

half of one per cent. per annum upon all real and personal property *actually* within the corporate limits of said city, made taxable by the law for county and territorial purposes."

The assessor shall make "a correct list of all the real estate within said city, and the *personal estate of all citizens thereof*;" and upon such property is to be levied the taxes spoken of in the charter.

The mode of conducting the assessment and collection the charter directs "shall be the same as in assessing and collecting county and territorial taxes."

The State law (Code, p. 898, s. 19,) provides that when any person is assessed as executor, a designation of his representative character shall be added to his name, and he shall be assessed for all personal property held by him in such representative character."

Section 3 (Code, p. 894) provides the terms "personal estate" shall be construed to include "all debts due, or to become due, from solvent debtors, whether on account, contract, note, mortgage or otherwise."

I think the plaintiff Johnson must, for the purposes of this case, be considered as sole executor, or as fully representing and by permission acting for his co-executor in all matters pertaining to the management, control and custody of the property in question. Mr. Dement, while in another State, and making no objection to that control and custody, can no more disclaim the acts of Johnson, or set up a claim of distinct ownership and custody, than if he were not an executor. Co-executors are considered in law as one individual person. The acts of any one of them are deemed the acts of all. (Bacon, Ab. "Executor," D. Com. Dig. "Administration," B. 12.)

I shall, therefore, dismiss all further consideration of that feature of the case, and deal with the questions arising as if Mr. Johnson was sole executor, or as if both instead of one of the executors were resident citizens of Oregon City.

The legal title of the personal property of an estate is in the executor or administrator when reduced to his possession or control, notwithstanding he holds it in trust. And if the State law had been silent on the subject, it would be

properly assessable to such trustee. Beyond what has been alluded to, this case presents no question that would not arise if the property in question had been the individual property of the plaintiff, W. C. Johnson.

It was admitted on the trial that the notes were taken out of the limits of Oregon City for the sole purpose of avoiding the assessment and taxation by that corporation, and the suit was brought for the purpose of testing the question whether the absence of the notes and mortgages, was sufficient to relieve them from liability to the tax.

Debts due to a person are taxable to such person, as a general rule, at the place where he resides, and debts of which there is no written evidence are evidently, by the city charter, made taxable to the citizens resident in Oregon City.

Is a promissory note identical with the debt which is secured by it?

Promissory notes are spoken of in the books as *choses in action*. A debt, the evidence of which is not in writing, is also a *chose in action*. If the paper on which the promise is written, or the written words, are what is meant, when it is said that a promissory note is a *chose in action*, or that a promissory note is personal property, there is reason for the position that removing the paper and the written words from the limits of a city removes the property from the city. And it is said, in support of the position, that the characteristics of a promissory note so indicate. Promissory notes are good in the hands of an innocent purchaser. A delivery of the paper passes the title of the *chose in action*; and for these purposes the paper may be said, at least, to represent and stand for the debt, if it is not in fact identical with it. But does it follow because delivery of the paper transfers the right of action from one person to another, that the paper and the right of action are one and the same thing, or that the place where the note may be, is the place of the indebtedness, or of the property.

The two are not always in the same place or in the control of the same person, for negotiable paper may be fraudulently taken from the owner and yet the debt—the right of

action—may remain in and with the owner. Again, it is not uncommon that duplicate or triplicate papers are made to represent, or to be evidence of, the same indebtedness, and the respective original copies may be in the hands of different persons, each claiming to be the holder and owner of the note and of the property the note represents, and yet that property may be in the original payee, and the evidence not in his possession or control.

The paper alone is not sufficient to constitute property. The paper may be of itself, and is, *prima facie* evidence of the existence of property. But if the paper is ever so perfect as a writing, it may have been made or obtained under such circumstances that there is no property in the thing it purports to represent. If the facts exist which the note declares, a cause of action exists—the property exists.

If the promise for a valuable consideration has been made, the property called the debt or indebtedness exists, whether the promise is reduced to writing or not. Making the note creates evidence, but the indebtedness may exist either with or without that kind of evidence.

The making of the note renders certain rules of evidence applicable to the transaction, that would not otherwise apply to the contract, and casts upon each of the original parties to the note new rights or liabilities under certain contingencies that may or may not happen. But there is nothing in the subject thus abstractly considered that would justly lead us to the conclusion, that the owner of an indebtedness, evidenced by a promissory note, can change the location of his property by changing the location of the evidence of that indebtedness, any more than the owner of a demand resting upon the evidence of a single witness can change the place of his property by changing the place of the witness. In the case of contracts not negotiable by delivery, it will hardly be contended, that to carry the written contract across the state line would remove the *choses in action* from one State to the other.

Intangible property not growing out of real estate must be held to follow the person of the owner. Instead of depending on the whereabouts of the evidence of the owner-

ship, the locality of this class of property must, in general, depend upon the locality of him whose personal property it is.

Had the plaintiffs delivered these notes upon a sale thereof, of course the plaintiffs' property therein would have been divested, and if removed to another town or state with the buyer, of course the location of the property would have been changed.

Or had the plaintiffs taken them out of Oregon City and pledged them in security for money, the plaintiffs would thereby have ceased to have the absolute property, and possibly the place of the property might thus be changed, but here no such question arises.

The framers of the charter seem to have understood the law of this subject in the light above set forth.

The charter makes no provision for assessing notes or other evidences of indebtedness, not the property of citizens of Oregon City, that might be actually in the city. It uses the words, "and the personal estate of all citizens thereof."

An assessment so made could not include such notes or other evidences of indebtedness not the property of the citizens. The indebtedness represented by notes so held would not be *actually* in the city, and, as a consequence, would not be embraced in the provision first quoted. There are reasons for excluding the tangible property of the citizens held and used elsewhere, as is done by the words "actually within the corporate limits," that do not apply to *choses in action*; 1st, because the use and advantages of such property are not likely to be enhanced or benefited by the municipal expenditures, and 2d, because the same property may be subject to similar taxes elsewhere.

I think it clear that the property in question was, because of its nature and the place of its ownership, actually in Oregon City and liable to be taxed there.

If it were doubtful, there is a reason, applicable to doubtful cases, that would be of much force in favor of this position—that is, the contrary rule would be in the highest degree impolitic. It would hold out strong inducements

to citizens to send their evidence of indebtedness out of the city and thereby avoid their due share of the public burdens. By doing this secretly, they might avoid local taxes at the place of deposit and thus escape entirely, while other citizens would have increased taxes. Possibly a still greater evil would arise under that state of the law, by rendering it impossible to ascertain the whereabouts of this kind of property, or to determine for what property citizens were liable to be assessed.

If the citizen, under this temptation, was induced to undertake to avoid taxation, it would be next to impossible to ascertain whether or not he had such papers actually within the city; and if they were absent, it would be difficult for assessors of other municipalities to learn where they were deposited, either for their assessment or for the purpose of punishing illegal evasion of the laws relating to State and county taxes.

The complaint should be dismissed.¹

3	18
3	257
3	258
5	124

CIRCUIT COURT FOR CLACKAMAS COUNTY, MARCH TERM, 1868.

A. F. HEDGES v. WM. STRONG, ADMINISTRATOR OF THE ESTATE
OF AMORY HOLBROOK, DECEASED.

STATUTE OF FRAUDS.—To bring a contract within the Statute of Frauds, relating to parol agreements not to be performed within a year, it must appear to be necessarily incapable of performance within that time.

PLEADING.—Where the statute declares a promise void unless in writing, it is not necessary to allege in the complaint that the promise is in writing.

NEW CONSIDERATION.—It is not necessary that the promise should be in writing, where the promise to pay the debt arises out of some new and original consideration of benefit moving between the newly-contracting parties.

PRESUMPTION.—If a note is found in the possession of the maker of the note, it raises a presumption that the note has been paid.

IDEM.—The presumption is disputable.

¹ Affirmed on appeal.

THE case is presented on demurrer to the complaint. The complaint charges that in 1860 the plaintiff held a promissory note of \$16,000 and interest, made by one David McLaughlin; that said McLaughlin at that time sold a valuable tract of land to one Daniel Harvey, receiving as part of the consideration said Harvey's notes to the amount of \$16,000, which latter notes Harvey deposited with said Amory Holbrook, giving to the latter power to act as said Harvey's agent; that the plaintiff, Hedges, commenced an action against said McLaughlin on the first mentioned note, and caused garnishee process to be served on both said Harvey and said Holbrook. Whereupon, said Holbrook, in open court, in order to procure a discharge of the garnishee process, promised to Hedges that he would pay Hedges the amount due to Hedges on the note as soon as the money should be made out of the notes left with him by Harvey, over and above money sufficient to pay certain designated claims and the attorney's fees owing by McLaughlin to Holbrook; and thereupon the garnishee process was discharged. The complaint charges that Holbrook received the requisite amount of money, but, although requested, did not pay, etc.

The ground of demurrer is that the complaint does not state facts constituting a case of action.

S. Huelat, for the plaintiff.

Wm. Strong, for the defendant.

UPTON, J. Two distinct grounds of defense, under the statute of fraud, are presented in the argument: 1st, That the contract was not to be performed within one year; 2d, That this is a promise to pay the debt of another, and is not in writing.

The first position is not sustained. The authorities are conclusive that the statute embraces only such promises as, by their terms, *are not to be performed* within the time. And does not embrace cases in which it may happen that performance will be required within the time, in pursuance of the terms of the contract. (1 Smith's Leading Cases, 435.)

"To bring a contract within the statute of frauds, relating to parol agreements not to be performed within a year, it must appear to be *necessarily incapable* of performance within that time." (*Artcher v. Zeh.*, 5 Hill 200.)

Before disposing of the second point, it may be proper to refer to a position taken by the plaintiff; that if the promise would otherwise be within the statute, the fact that it was made by an attorney, while acting in his official capacity, and in the presence of the court, and that it was the predicate of an order discharging the attachment, it is binding.

The cases cited from 41 Barb. 648, and 4 Sanf. Ch. 438, refer to promises and representations made in the progress of the same cause, where enforcement was asked. It seems reasonable and necessary that the court, under such circumstances, should have power to compel a party, and, especially, an attorney of the court. But this court cannot take judicial notice of what transpired in another court, and a resort to parol evidence, to show that the promise was made in open court, is as objectionable as resorting to parol to show that it was made at all. To make such a promise the foundation of a new action, would be open to all those objections of uncertainty, which caused the enactment of the statute.

This question might be disposed of, upon the ground, that although on the trial of an issue written evidence of the promise would be required, yet it is not necessary to allege in the complaint that there is a writing. But the case has been argued upon the assumption that the promise rests in parol, and it is evident that the same question would arise on the trial, if not passed upon at this time; it is as well to treat the case as if it appeared on the face of the complaint that the promise was not made in writing.

The sufficiency of the complaint, then, must turn upon the question, whether within the meaning of the statute, this is only a promise to pay the debt of another.

The plaintiff claims that it is a new and original contract, founded on a consideration moving, not between the parties to the first contract, but between Mr. Holbrook and

the plaintiff, and that the consideration was both a benefit to Mr. Holbrook, and a harm to the plaintiff.

For the purpose of illustration, law writers have pointed out three classes of cases, and drawn the lines of demarkation as follows:

“1st. Where the promise is collateral, but is made at the same time, and is a ground of the original credit.

2d. Where the collateral promise is subsequent, and not an inducement to the creation of the debt.

3d. Where the promise to pay the debt of another, arises out of some new and original consideration of benefit, moving between the newly contracting parties.”

The first two classes are within the statute of frauds, but the last is not. (*Leonard v. Vreden*, 8 John. 29.)

The distinction thus drawn by Chief Justice Kent is the recognized law, and is sustained by modern cases. The only inquiry necessary to make is whether the complaint shows a benefit to Mr. Holbrook to have been a consideration for his promise.

It seems that there was a garnishee process served upon Holbrook, which, if followed up as the plaintiff had a right to follow it, might have put Holbrook to trouble and expense, and might have resulted in a judgment against him. It can hardly be said that the discharge of the garnishee process, and dismissing the proceeding, was no benefit to Holbrook. There was a possibility that the act would not ultimately be an advantage to him, but the material point is whether he made the promise because of an expected benefit moving to himself, and whether, because of that expected benefit, he made a promise which caused the plaintiff to dismiss the proceeding under the attachment.

Had the garnishment been retained, it might have interfered with Holbrook's business of collecting and disbursing the money due from Harvey, and might have delayed the time of obtaining, if it did not diminish the amount of, the fees then being earned by Holbrook. And it might have diverted the business of making those collections from Holbrook and given control of the notes to the plaintiff.

I think the complaint shows a promise founded upon a

new consideration beneficial to Mr. Holbrook, and that the demurrer should be overruled.

The defendant filed his answer, denying the allegations of the complaint, and the cause being tried, the jury was instructed as follows:

The plaintiff founds his demand upon an alleged promise made by Amory Holbrook in his lifetime, that he, Holbrook, would pay the plaintiff the amount of money mentioned in the complaint. Under our statute, a contract, which by its terms is not to be performed within a year from the making thereof, is void; that is—if the terms of a contract shows that it cannot be performed within a year, it is void; but if such is not the case, and if, according to the terms of the contract, circumstances may arise that will make its performance due before the expiration of a year, it is not void by that statute, although not in writing. If you find that, in case Mr. Harvey had paid his notes before the expiration of the year, the terms of the agreement would have obliged Mr. Holbrook to perform its conditions in less than a year, it is not a case requiring the promise to be in writing, because of the time in which it is to be performed.

If this was a bare promise to pay the debt of another, it is void, because not in writing; for an unwritten promise to pay the debt of another, when there is no new consideration moving to the person who makes the promise, is void.

It is not binding unless there is in substance a new contract made. If a person, for the sake of an advantage to himself, promises to pay the debt of another, and by making the promise induces the person, to whom the promise is made, to forego some right or privilege because of the promise, the law treats such new promise as a new contract and as an original promise, founded upon sufficient consideration moving between the maker of the new promise and the person to whom it is made.

The debt thus incurred is not simply the debt of another, but the law treats the transaction as a new and original undertaking, entered into by the new party, upon a suffi-

cient consideration of benefit to the party making the promise. It is not material how great or how small is the advantage to be derived or expected on the part of the new promissor. It is sufficient if he deemed it of some advantage, and made the new promise in order to gain that advantage.

You will determine from the evidence what promise, if any, was made by Mr. Holbrook. What were its terms, and what considerations induced him to make it, and what are the facts in regard to the time it was to be performed. And if, under the law, as already stated, it was valid and binding, you will determine from the evidence whether the contingencies have happened under which performance could be required.

If you find that Mr. Holbrook has made a binding promise, you will determine from the evidence in the case what claims or notes against Mr. McLaughlin had been paid or accepted by Mr. Holbrook before his promise was made to the plaintiff, and whether he has received from Harvey more money than was necessary to cover the claims and notes so paid or accepted, together with Mr. Holbrook's individual claims against McLaughlin, and if more, how much more he has received. For Mr. Holbrook or his administrator could not, under any circumstances, be liable to the plaintiff for money that was necessary to satisfy his own demands, or those that he had accepted before the agreement was made.

The notes of Mr. McLaughlin, found among the papers of Mr. Holbrook, are offered by the defendant as evidence to show, or tending to show, that they had been paid or accepted by Mr. Holbrook.

If a note is found in the possession of the maker of the note, it raises the presumption that the note has been paid.

Whether these notes were held by Mr. Holbrook as agent for Mr. McLaughlin, is a question of fact for the jury. If Mr. Holbrook held them as agent for Mr. McLaughlin, his having possession of them raises the same presumption as if McLaughlin had held them. That is that they had been paid. Such a presumption is disputable by other evidence.

As to the *time when* these notes or any of them were paid, and the question whether the accepted demands were paid or accepted before or after the alleged promise, the jury are to determine from all the evidence in the case. (a)

CIRCUIT COURT FOR CLACKAMAS COUNTY, MARCH TERM, 1868.*

GEORGE AND THOMAS MILLER v. OREGON CITY
PAPER MANUFACTURING COMPANY.

CONFESSION OF JUDGMENT.—Where a confession of judgment is made, “in an action pending,” the statement mentioned in sec. 252 of the Code is not requisite.

CORPORATION.—The president of a private corporation is competent to confess judgment.

JUDGMENT, HOW SET ASIDE.—A charge of actual fraud, in procuring a judgment by confession, should not be finally determined on motion and affidavits.

PARTIES.—A corporator may sue his corporation.

DIRECTOR.—A director is not bound by the vote of a majority, where he claims on a contract in which he is one party and the corporation another. The court refused to set aside a judgment in favor of a director and against his corporation, obtained by confession.

CONFIRMATION OF SALE.—A mere judgment creditor, who is not a party to the action, cannot appear to oppose the confirmation of a sale.

Mitchell, Dolph and Smith for George and Thomas Miller.

W. W. Page, contra.

THREE different parties had each commenced an action against this defendant, a private corporation, and each had obtained a judgment by confession, the president of the defendant having confessed judgment in each case on the 3d day of July, 1867. The names of the plaintiffs and the amount recovered by them, respectively, are as follows:

(a) The jury having been discharged without a verdict, a compromise was effected, and judgment entered by consent.

* This case was, by consent, argued in Multnomah County at chambers. The decision was affirmed on appeal, under the name of *Miller Brothers v. Bank of British Columbia*.

Charles S. Miller recovered \$6,373 30, A. J. Block recovered \$378 67, and the Bank of British Columbia recovered \$10,040.

Execution was issued in each case, and real estate, namely, the defendant's factory, having been sold, each of the said plaintiffs moved for confirmation of the sale. These plaintiffs, George and Thomas Miller, commenced an action against the same defendant about the same time, and on the 19th day of July, 1867, obtained a judgment by default for \$1,147 12. They have filed a motion, supported by affidavits, to set aside each of the three judgments so obtained by confession. And they also appear in each one of those cases, and oppose the motions for confirmation of the sale.

By consent of all parties, all these motions are taken under consideration at one time and submitted upon the same argument.

It is claimed that the judgments by confession should be set aside, for these reasons :

1. There is no statement of the facts out of which the indebtedness arose.
2. The president of the corporation was not authorized to confess judgment.
3. Fraudulent acts of the defendant and of the plaintiff Block, stated by affidavit.
4. The plaintiffs Charles Miller and Block are directors.

URPON, J., filed the following opinion.

It is claimed that the confessions in these cases are irregular, for want of a statement of facts in compliance with section 252 of the code. The code recognizes two modes of confessing judgment, namely, "without action" and "in an action pending." In the former, "the confession shall be made, assented to and acknowledged, and judgment given in the same manner as a confession in an action pending;" and it "shall state plainly the facts out of which the indebtedness arose." I cannot think that the statute requires the same statement of facts to be contained in the judgment where the confession is made "in an action pending." It seems that such statement is to stand in the place

of a complaint in a case where judgment is confessed without action.

When an action is commenced, and a complaint filed, which would be good on demurrer; and the defendant confesses its truth, and otherwise complies with the statute, it is not required to make the statement mentioned in section 252.

In regard to the authority of the president of a corporation to confess a judgment, section 248 designates that officer as one competent to make the confession; and I think there is no rule of law that will require him to place on file, or to exhibit evidence of his being specially directed or authorized in the particular case by the directors, or other power of the corporation. If he should act wholly without such direction, and even against the interest of the corporation, it is doubtful whether any one except the corporation could raise the objection, unless by a bill in chancery. Another question is, whether fraud in the confession of the judgment, not appearing on the record, can be set up by motion and tried upon affidavits.

I am satisfied upon examination of authorities, that a junior judgment creditor is entitled to obtain relief upon motion, where the record shows that a judgment by confession has been irregularly entered. But it is not clear that a charge of actual fraud in procuring the confession, not supported by the record, ought to be tried upon motion and affidavits; none of the authorities cited go to that extent.

The trial of a disputed question of fact upon affidavits, to the exclusion of all benefit of cross-examination, is at the least, a most unsatisfactory mode, and if ever permissible as a means of establishing fraud in fact, it should only be resorted to in plain and undisputable cases.

A charge of actual fraud in procuring a judgment by confession, not supported by the record, should not be finally determined upon motion and affidavits.

Whether one who is a director can sue the corporation in which he holds that position, is a question raised in this case, but no authorities are cited in opposition to such proceeding.

It is well established that a corporator may contract with his corporation, and sue or be sued on his contract. (*Calbertson v. Wabash Nav. Co.*, 4 McLean, 544; 3 Mass. 385.) And I know of no sound reason for a distinction in this particular between a director and any other corporator.

Although he is bound by a vote of a majority, even when he dissents, this is not the case when he claims on a contract, in which he is one party and the corporation another. (*Revere v. Boston Copper Co.*, 15 Pick. 363.)

It does not appear affirmatively but that the president acted by the direction of the directors.

I think the proceedings are not shown by the record to be irregular, and that the matters set up by affidavit do not warrant the court in determining, upon motion, that the judgments are fraudulent in fact. These motions must, therefore, be denied.

According to section 293 of the code, objection to confirmation of the sale can only be made by "the judgment debtor, or, in case of his death, his representative." As mere judgment creditors, not parties to the action, George and Charles Miller cannot appear in this motion.

As no competent party has filed objections, the sale must be confirmed.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1868.

ISAAC S. TOBY v. FERGUSON *et al.*

JUDGMENT, HOW PLEAD.—In pleading the judgment of a Court of special jurisdiction, it is not necessary to state the facts that confer jurisdiction.

DEMURRER.—If a demurrer strikes at the whole of an answer, as not constituting a defense, and there is a part of the answer that amounts to a defense, the demurrer will be overruled.

THIS case was heard on demurrer to the answer; the facts appear in the opinion filed in the cause.

Caples & Moreland, for the plaintiff.

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129	388

Page & Stevens, for the defendant.

UPTON, J. This is an action for false imprisonment. The defendant, after denying some of the allegations of the complaint, makes a "further answer," to which the plaintiff demurs.

Omitting formal words, the further answer states that "the writ of arrest was duly issued out of the county court of said county," for the said Toby, "for causes allowed by law and specified in section 106 of the code of civil procedure," and the arrest was thereon made. "And thereafter, on the 28th of April, 1868, in the said action in the said county court, judgment was duly rendered and given in favor of said" Ferguson *et al.*, "against the said Toby, for the sum of \$317.80, and that in default of the payment of the said judgment, that he, the said Toby, be kept in custody until discharged according to law." That execution thereupon issued, upon which the said Toby was thereafter imprisoned until discharged.

The grounds of the demurrer are that art. 1, sec. 19 of the state constitution provides that, "there shall be no imprisonment for debt, except in cases of fraud or absconding debtors." And that the answer does not show that this arrest was made in such a case, inasmuch as section 106 includes other declared causes for arrest.

This point involves indirectly the question of the constitutionality of section 106 of the code. But I do not feel called upon to pass upon the question, as I think the answer should be sustained on grounds aside from the constitutionality of that section.

It appears from the answer that a cause was pending between the parties in the county court; that the court had jurisdiction of the *action*, and that that court "duly rendered" a judgment of imprisonment against this plaintiff, and that a portion of the imprisonment complained of was under that judgment. Under section 85 of the code this judgment is well plead, and is a defense to that extent. "In pleading the judgment of a court or officer of special jurisdiction, it shall not be necessary to state the facts that confer jurisdiction."

The demurrer strikes at the whole of this "further answer," and as there is a part of it that amounts to a defense, the demurrer must be overruled.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1868.

E. H. BURTON v. WALTER MOFFITT AND J. A. STROWBRIDGE.

PARTY WALL.—The owners of a party wall, built at joint expense, are not tenants in common, but each owns his own land, with a right to use the wall, which he may enforce by action.

ENCROACHMENT.—Where one party contracted to build a wall sixteen inches or two bricks thick, on the division line, and to permit the other party to use the wall upon his paying one half the cost; and in constructing the wall he erected an iron pilaster of his building, which was ten inches wide, so that one half of it stood on each side of the division line; *Held*, that the pilaster was not part of the wall contracted for, and that it was improperly extended beyond the division line.

DISCRETION.—Although the removal of the pilaster was deemed the only adequate remedy, a temporary injunction before final hearing was refused, on the grounds that the plaintiff showed no indications of presently occupying the premises, and the building had so far progressed that a removal would be nearly or quite as expensive at the present time as at the completion of the building. Granting or refusing the order in such case deemed the exercise of the discretion of the court.

COMPENSATION.—Where, by not conforming to the terms of the contract, the width of the plaintiff's premises above the upper floor was improperly diminished by two inches, the injunction was denied, on the ground that the injury is not beyond pecuniary compensation.

THIS case was heard on a motion for an injunction.

The complaint presents the following facts: The plaintiff's grantor being the owner of lot 4, in block 4, in the city of Portland, bargained in writing, not under seal, with Moffit and Strowbridge, owners of the adjoining lot, (being lot 3 in the same block,) that M. and S. should build a wall on the line between the two lots for the mutual use of the owners, of dimensions as follows: The "foundation twenty inches thick; first story sixteen inches or two bricks thick;

second story twelve inches or one and one half bricks thick, to extend on the land of both parties equally." The plaintiff's grantor and his assigns were by the contract "to have the privilege of owning and using one half of said partition wall, by paying to M. and S. one half the cost thereof when they should use the same for building purposes, at the estimated cost of building a similar wall at the time of using said wall."

The plaintiff and the defendants each had a frontage on Front street of twenty-five feet; the defendants owning the north twenty-five feet.

The defendants commenced the proposed wall, and constructed the brick work up to the second floor according to the terms of the contract. But the south face of the wall they carried up perpendicularly, as well above as below the second floor, making an offset of four inches on the north side at the second floor, instead of an offset of two inches on each side. Thus two thirds of the twelve-inch wall was built on the plaintiff's premises. The defendants also so constructed an ornamental *iron front* of their lower story that the south pilaster thereof projected about four inches south of the line between the lots 3 and 4, and the iron cornice projected eight and three fourths inches south of that division line.

At the time of the filing the complaint and serving notice of this motion, the iron front was set, and the work of laying brick above it had commenced, but not many brick were laid above it, or above the second floor.

By consent, witnesses were examined orally on the order to show cause.

Experts testified that the workmanlike mode of furnishing ornamental fronts of contiguous buildings, of different styles of architecture, was, "to return the cornice into the building, and not around the [angle of, the] building." And that in front of the side wall, which is common to the two buildings, there should be two pilasters, one appertaining to, and conforming to the style of, each building.

Logan & Shattuck, for the plaintiff, claim that the mode of making the off-set in the brick wall is an encroachment that deprives the plaintiff of two inches of space above the

second floor and totally unfits the premises for the purposes of the plaintiff.

And that if the defendants are allowed to finish and maintain their ornamental front, it will be in the way of the front which the plaintiff designs to use, and will destroy the symmetry of his proposed building. And that each of the injuries is such that money is not an adequate compensation.

Stout, Reed and Strong, for the defendants, claim that if there is a fault in making the off-set, the plaintiff has shown no special or irreparable injury. That he has no present use for the ground, and it is uncertain when he will use it, if ever. And that it would be an injury to the wall to leave an off-set for years on the side, having no roof. That the iron pilaster is a part of the wall which they contracted to build. That the materials are not specified by the contract, and that they have the right to build such portion of it as they choose of iron.

The following opinion was filed in the case, by UPTON, J.:

This is an application for a preliminary injunction, but I presume nearly all the facts are presented that will be adduced on the trial; and in the argument, attention has been given to the subject of the ultimate rights of the parties as well as to the propriety of granting or refusing the present motion. The defendants claim that their iron pilaster, which is ten inches wide, with a base and capital twelve inches wide, is a part of the wall contracted for.

I think this cannot be maintained. If it is part of the wall, they were bound to build it of certain thickness; this part of the wall was to be sixteen inches thick. By departing from the specified thickness of the wall, they show that they did not consider the iron pilaster a part of the "wall" called for by the terms of the contract. The wall is spoken of as "two bricks thick." If they had a right to build the wall of iron, they had a right to charge half the cost of the iron to the plaintiff; and if of iron, they could build it of still more costly material, and charge the plaintiff with half the cost of a similar wall, at a future time.

The iron front must be considered distinct from the wall contracted for, both because it is a reasonable construction of the terms of the contract when examined in connection with the circumstances under which the contract was made, and because both parties have so treated it.

By the terms of the contract the wall was to be built for the use of each party. The plaintiff was to have the "privilege of owning and using one half" of the partition wall. Half of it stands upon the land of each, and half of it will be the separate property of each, subject only to the right in the other to a reasonable use of the whole.

"The owners of a party wall built at joint expense, are not tenants in common, but each owns his own land, with a right to use the wall, which he may enforce by action." (*Matts v. Hawkins*, 5 Taun. 20; *Cubitt v. Porter*, 8 Barn. & Cr. 257.)

So the plaintiff and defendants in this case will each have a right to the use of their respective lots, and to the sole use, saving only, and subject only, in each case to the right the other will have to the use of the party wall; hence it will be important to consider what rights one of them will have to or in this wall, aside from the right he has to the half of it by virtue of owning the ground on which that half stands. Each part of the wall gives strength and support to the other part; the owner has a right to that support. He has a qualified right in the whole wall, but still he must so use it as not to interfere with the right of his neighbor to a similar use of it.

It is by the contract evidently in contemplation that each of the parties will construct a building; probably buildings in many respects similar. In each case symmetry and beauty of front will be an element going to make up the value and availability of the proposed building. There is nothing in the nature of the right which one of these parties acquires in the property of the other, that will justify extending his pilaster or cornice beyond the original boundary line. Such a proceeding is a violation of the rule, that he must so use his own as not to injure others; and it even goes beyond that by an actual encroachment upon the premises of another.

"Each is owner in severalty of the portion of wall situated on his own land, with no qualification except that neither has a right to pull it down without the other's consent." (*Sherred v. Cisco*, 4 Sandf. Sup. C. 480.)

I cannot now see any grounds that justify the defendants in projecting their iron front upon the premises of the plaintiff. Nor can I say that any remedy but its removal will be adequate under the facts as they are presented on this motion.

But it is not shown that the plaintiff is now engaged in building, or that he intends to build on his lot, at so early a day as to make the removal of this obstacle necessary before the final hearing in this suit. It is shown by the evidence of experts that the removal would be attended by nearly or quite the same expense at the present time that it will be if required after the completion of the building; and the completion of the building will not tend to render the decree ineffectual so far as relates to the iron front.

I think, therefore, in regard to this branch of the case, it will be a proper exercise of the discretion of the court to refrain from making an order until after final hearing.

As to the location of the wall of the second story, it is not shown that the plaintiff will be irreparably injured; but, on the contrary, the plaintiff admitted, when on the stand as a witness, that the injury, which is a mere diminution of the width of his premises above the second floor, might be fully compensated by a sufficient payment of money.

I am not inclined to place the refusal of this motion on the ground asserted in argument; that literally the wall, treated as a whole, extends equally on the lands of each party. The spirit and intent of the contract does not seem to me to be complied with in this respect; a fair construction is, that no more of the plaintiff's premises should be encumbered than of the defendant's. But I think the circumstances, that it was uncertain how long the wall would stand before the plaintiff would build and protect it by a roof, and that the contract leaves that matter to the party's option for an indefinite period, may well be considered in determining whether the defendants shall now be restrained,

and compelled to rebuild that part that is already constructed above the second floor. .

Under the circumstances of the case I shall decline making an injunction order before the final hearing. And the present motion will be denied.

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CIRCUIT COURT FOR MCLINTOSH COUNTY, JUNE TERM, 1868.

J. G. CHAPMAN v. PATRICK RALEIGH.

TRANSCRIPT OF DOCKET.—Where a transcript on appeal from a justice's court was filed, and was treated as a transcript filed with the county clerk to authorize the judgment to be docketed in the circuit court, and an execution was issued out of the circuit court, the execution was set aside on motion.

THE plaintiff recovered a judgment in justice's court for \$75, on the 12th of June, 1858. On the 7th of July following, the defendant appealed to the circuit court. On the same day the plaintiff filed a counter undertaking, in pursuance of section 71 of the act relating to justice's courts.

On the 16th of July the defendant filed with the clerk of this court a transcript of the docket and the original papers in the cause, in pursuance of section 72 of the act. Thereupon the plaintiff caused an execution to issue out of the circuit court to enforce the judgment set forth in the transcript.

The defendant now appears and moves this court to set aside the execution.

J. G. Chapman, in person.

Shattuck & Killin, for the defendant.

BY THE COURT; UPTON, J. The plaintiff claims that in filing a transcript in pursuance of the statute that regulates appeals, he has also literally complied with section 50, which provides for docketing judgments rendered by justices of the peace in the judgment docket of the circuit

court; and that therefore he is entitled to execution issuing out of this court. He, as respondent, claims, that having given a counter undertaking, he is, according to the spirit and intent of the law, entitled to an execution as if no appeal had been taken; and that if he was entitled to an execution issued out of the justice's court before the transcript was filed, upon filing it he becomes entitled to one issuing out of this court.

I do not think it is necessary to pass upon the various questions raised and argued, as to the sufficiency of the counter undertaking. I do not think it was the intent of the Legislature that the transcript on appeal should serve the double purpose of bringing the case here for a trial *de novo* and of standing as the record of a final judgment, to be enforced in pursuance of section 50.

Nor is the proceeding already taken a literal compliance with section 50. This transcript is required to be filed with the clerk of this court, while section 50 requires the transcript that shall serve as a basis of a judgment lien, and of an execution, to be filed with the *county clerk*.

It is true that both these offices are united in the same person; and there is but a technical difference in this respect in the modes of proceeding. But this is sufficient to prevent a course of proceeding that claims no greater merit than that of being a compliance with the letter of the statute, while it evidently disregards its spirit and intent.

The motion should be granted.

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3	40

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1868.

S. O. LANDER v. SAMUEL A. MILES AND JOHN COLLINS.

VENUE.—On a motion for change of venue for convenience of witnesses, counter affidavits of inconvenience to witnesses of the adverse party were heard.

ARREST.—The crime of assault with a dangerous weapon is a felony, and a person guilty of that offense may be arrested by a private person, although the latter did not see the offense committed.

PREPONDERANCE OF EVIDENCE.—In justification of an arrest, a preponderance of evidence is sufficient, on the point whether the arrested party had committed a felony.

JUSTIFICATION.—Firing a gun upon a person, in order to secure his arrest, is justifiable only where it is necessary. It is not justifiable where the arrest can be secured by less dangerous means.

In this action the plaintiff claims \$20,000 damages, for alleged unlawful arrest, wounding and imprisonment of the plaintiff. The defendants justify, claiming that at the time of the arrest the plaintiff had recently committed a felonious assault with intent to kill, and was fleeing from justice, and that the wounding was necessary in order to secure his arrest.

On the trial, it appeared in evidence, that a few days previous to the arrest, the plaintiff and two others, Wilkins and Card, had a personal rencounter in Washington County, in which the plaintiff fought against the two; that the plaintiff struck one of them with a gun-barrel, injuring him severely, and also struck one of them with a pitchfork-handle. All the parties had been drinking to excess. The evidence is conflicting as to who made the first assault, and as to the degree of violence used against the plaintiff. After the rencounter the plaintiff fled, a warrant was issued for his arrest, and placed in the hands of the sheriff of Washington County, and the sheriff offered, and published notice of, a reward for the plaintiff's apprehension. The defendants, at or near St. Helens in Columbia County, discovered the plaintiff, passing down the Columbia River alone in a skiff. They procured a skiff, pursued, overtook and hailed the plaintiff, who reached the bank of the river, and was in the act of stepping out of his skiff on to land, to elude their pursuit, when the defendant Collins fired with a rifle upon the plaintiff, from the pursuing boat (which was twenty or thirty feet from the plaintiff). The rifle-ball broke the plaintiff's leg; and the limb was afterwards amputated near the body, in consequence of the wound.

The defendant, in justification, had answered that at the time of the wounding the plaintiff was fleeing from justice, stating facts to show that the plaintiff had recently committed

a felonious assault with a dangerous weapon, and with intent to kill, and that the shooting was necessary in securing his arrest. There is also in the answer a statement that the plaintiff was charged with that offense, that a warrant had been issued, and that the plaintiff was fleeing on that account, and that the defendants were acting in good faith, for the purpose of making the arrest, and without malice.

J. F. Caples, Esq., for the plaintiff.

Judge E. D. Shattuck, for the defendants.

The defendants moved for a change of venue, on the ground of convenience to witnesses; showing the names of their witnesses, residing at St. Helens, the place of holding the circuit court for Columbia County. The plaintiff filed counter affidavits, showing the residences of an equal number of his witnesses to be in Washington County; and in such direction, as to compel them to pass the place of holding this court, to reach St. Helens.

The defendants claimed that counter affidavits cannot be heard on a motion for a change of venue.

The court refused to strike out the counter affidavits, and, after argument, overruled the motion to change the place of trial.

A jury being impaneled, and the evidence and arguments of counsel submitted, UPTON J. instructed the jury as follows:

The plaintiff sues to recover for an alleged assault and battery, and for alleged false imprisonment.

The defendants, among other grounds of defense, seek to justify their acts on the ground that those acts were done in the lawful arrest of the plaintiff. The defendants have also offered proof in mitigation of damages.

If the plaintiff has made out a *prima facie* case, that is, if he has proved such facts as show in him a right to recover damages, the burden of proof is thrown on the defendants. And in that case, it becomes material to consider, whether the defendants have established a justification.

And if a justification is not shown, it will be proper to consider whether the circumstances should operate in mitigation of damages, and if at all, to what extent.

The jury should carefully distinguish between what is a justification, and what are only circumstances in mitigation.

A justification is where the act is shown to have been lawfully done.

Circumstances are in mitigation of damages only when they do not tend to show that the act was lawful, but merely tend to show that it was done without bad motives.

For instance, the warrant issued to the sheriff of Washington county, or the notice of a reward offered for the plaintiff's arrest, are neither of them evidence tending to show a justification; for neither of them added anything to the rights or power of the defendants in making the arrest; but they are evidence in mitigation of damages, tending to show that the defendants acted with good motives.

A private person may arrest another:

"For a crime committed or attempted in his presence."

"When the person arrested has committed a *felony*, although not in his presence;" and

"When a *felony* has in fact been committed, and *he has reasonable cause* for believing the person arrested to have committed it."

If the plaintiff committed a *felony*, on occasion of the rencounter with Wilkins and Card, the defendants had a right to arrest him.

"A felony is a crime punishable with death, or which is, or *may be* punishable by imprisonment in the penitentiary of this State."

A simple assault is not a felony. But an assault with intent to kill, or an assault with a dangerous weapon, may be punished in the state penitentiary, and is, consequently, a felony.

In determining whether the plaintiff committed a felony at the time of that rencounter, is involved what is called the law of self-defense. Because the plaintiff claims that whatever violence he used on that occasion was in the necessary defense of his own person. Where one, who has not sought

the quarrel and is otherwise without fault, is assaulted, he has a right to use all proper and necessary means to defend and protect his person. But if in the rencounter he uses more force and violence than is necessary for his protection and safety, he becomes himself the aggressor, and becomes also guilty of an assault. And when a rencounter has been brought on by his adversary, if after all danger to his person has ceased, he unnecessarily, wantonly and dangerously beat his adversary with a dangerous weapon with which he is armed, he is guilty of a felony.

It is for you to determine, as a question of fact, whether the plaintiff committed a felony on occasion of that rencounter. The burden of proof is on the defendant to establish that fact, but it is to be decided according to the preponderance of evidence; this being a civil case; and he is not required to satisfy you beyond a reasonable doubt.

If you find that the plaintiff did commit a felony on that occasion, it will be your duty to determine whether or not the mode of making the arrest is such as can be justified.

Firing a gun upon a person in order to secure his arrest, is justifiable only when it is necessary. It is not justifiable when the arrest can be secured by less dangerous means. It is a question of fact for you to determine whether the shooting was necessary, in order to arrest the plaintiff.

If you find that the plaintiff had committed a felony on the occasion of the rencounter, and that the shooting was necessary in order to make the arrest, you will find for the defendants.

If you do not find both of these matters in the affirmative, the plaintiff will be entitled to damages; and it will be for you to determine from the facts established by the proofs what will be a just compensation to be recovered by the plaintiff under all the circumstances of the case.

If you find for the plaintiff, the amount recovered by him should be as *compensation*. Punishment should not in this case be treated as an object of the action, and it is not a case calling for exemplary or vindictive damages.

The jury returned a verdict for the plaintiff of \$4,800.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1868.

S. O. LANDER v. SAMUEL A. MILES AND JOHN COLLINS.

MOTION FOR A NEW TRIAL.

NEW TRIAL.—The court is not at liberty to grant a new trial upon doubtful and disputed questions of fact.

NEWLY-DISCOVERED EVIDENCE.—Motions for new trial on the ground of newly-discovered evidence are regarded with distrust, and the strictest showing of diligence, and of all other facts necessary, is required. The testimony must have been discovered since the former trial; it must be shown that it could not have been obtained with reasonable diligence on the former trial; and it must not be cumulative.

AFFIDAVIT OF WITNESS.—It is a practice that seems to be generally approved, to require the affidavit of the moving party to be accompanied by the affidavit of the witness, or the omission to be accounted for.

CUMULATIVE.—Evidence of material facts which the moving party did not prove nor attempt to prove, may be regarded as not cumulative.

DILIGENCE.—A party who moves for a new trial should be free from *laches* in not having moved for a continuance. It is not sufficient that the affiant depose in terms "that he has made diligent inquiry;" the affidavit should state facts. The question of diligence must be determined by a consideration of specific facts deposed to.

THE jury having rendered a verdict for \$4,800 in favor of the plaintiff, the defendants filed a motion for a new trial, the motion being argued and submitted by the same counsel who conducted the trial.

The court filed the following opinion, overruling the motion :

Only three of the specified grounds were urged on the argument of the defendant's motion for a new trial. They were :

1. Newly-discovered evidence ;
2. Excessive damages ;
3. And insufficiency of the evidence to justify the verdict.

Upon the two points last named, as the evidence is not made part of the record, the mover relies upon the knowledge and recollection of the court. I cannot say that the evidence was not sufficient to justify the verdict.

When the plaintiff had proved the wounding and impris-

onment, and the disastrous effect of the wound, it became incumbent on the defendants to justify or excuse the acts proved. For this purpose they offered evidence tending to show that a felony had been committed by the plaintiff, and that the means used to arrest the plaintiff were necessary and proper. If the defendant established both these propositions, the verdict was against evidence; but if he failed in regard to either proposition, the plaintiff should prevail.

In the opinion of the court, neither proposition was conclusively established; nor can I say the weight of evidence was with the defendant on each of them. The court is not at liberty to grant a new trial upon doubtful and disputed questions of fact, and thus usurp indirectly the province of the jury.

Nor can the court, from any *data* before it, say that the damages were excessive, or given under the influence of passion or prejudice. The jury were instructed, I think, correctly as to the measure of damages; or, at least, if there was error in that particular, I think it was in favor of the defendant; the jury having been told that exemplary or vindictive damages could not be given in the case. Jurors are necessarily the judges of the weight of evidence adduced in mitigation of damages, and in this case the evidence was conflicting.

The injury is of a most grave and serious character; and if the plaintiff was entitled to recover, it is impossible to say with certainty that a less sum would be adequate compensation for the loss of a limb, disregarding the minor considerations, such as bodily pain, loss of time and expenses incurred.

There are no facts or circumstances in the case that lead the Court to infer or suspect that the jurors were influenced by passion or prejudice. It would be unreasonable to draw such inference from the amount of the verdict in this case. From the very nature of the injury, which includes the loss of a limb, it is difficult, if not impossible for one man to tell what would be the honest conviction of another as to the amount required to compensate for the loss.

A judge is no more authorized to set aside a verdict because he differs from the jury as to weight of evidence, where it is conflicting and where there is ground for an honest difference of opinion, than a jury would be to decide contrary to the instructions given, but in accordance with their wishes or preferences.

To sustain the ground of *newly-discovered evidence*, the affidavit of the defendant Miles states that the affiant "expects and believes that Job Card will swear that he is one of the persons beaten and assaulted by the plaintiff * * * that Card was sober at the time, and recollects distinctly all that occurred; that there was no assault whatever committed on the plaintiff by Wilkins or Card;" but that after some words between the parties, "the plaintiff violently assaulted said Card, and that the plaintiff's shirt was cut in attempts to resist the assaults made by the plaintiff; and that the plaintiff, without any just cause or provocation, used the gun-barrel and the pitchfork, referred to in the evidence, wantonly and maliciously; and severely and cruelly beat, bruised and disabled said Card and said Wilkins." "And that the plaintiff had repeatedly made threats of violence against said Card." The affiant says he has made diligent inquiry in Washington County and elsewhere, and caused others to do so for said Card but could not ascertain where he was until Wilkins (on the trial) testified to his whereabouts. That he heard a variety of reports as to his whereabouts, but could get no definite information sooner.

On the trial, both the plaintiff and Wilkins testified as to the rencounter. They both testified that both Wilkins and Card were intoxicated at the time of the rencounter. Wilkins said he was too much intoxicated at the time of the rencounter to tell what occurred at the commencement of the fight.

The affidavit of Miles is objected to, as not showing diligence; that the evidence is cumulative; and that it is not shown that the evidence has been discovered since the trial. And the plaintiff claims that evidence given on the trial, to the effect that the defendant Miles was well acquainted

with both Wilkins and Card before the difficulty, and that the two were near neighbors, should be considered.

The necessity and propriety of granting new trials in proper cases, and the necessity of strict practice to prevent abuse and unfair advantage being obtained by granting, are equally important. Caution is particularly necessary when the motion is founded on newly-discovered evidence, both because it opens a temptation to perjury, and because its abuse would give an unfair advantage, by allowing a party to take the chance of success with a part of his witnesses, and if not successful, to avoid the consequences of his venture, by a new trial, while his adversary would be remediless if unsuccessful at either trial.

Hence "motions for a new trial on the ground of newly-discovered evidence are regarded with distrust and disfavor, and the strictest showing of diligence and all other facts necessary is required." (*Baker v. Joseph*, 16 Cal. 180.)

It is considered settled—First: That the testimony must have been discovered since the former trial.

Second: That it could not have been obtained with reasonable diligence on the former trial. (*Moore v. Philadelphia Bank*, 5 Serg. and Rowle, 41; 13 Mass. 302; 7 Mass. 205.)

Third: That it must not be cumulative. (*Bartlett v. Hodgden*, 3 Cal. 57; and *Ib.* 114, 399; *Gavan v. Dopman*, 5 Cal. 342; *Live Yankee Co. v. Oregon Co.* 7 Cal. 42; *Duryee v. Dennison*, 5 *Ib.* 248; *People v. Superior Court*, N. Y. 10 Wend. 292.)

"Cumulative evidence means additional evidence to support the same point, and which is of the same character as evidence already produced." (10 Wend. 292.)

It is the practice in some jurisdictions, and one that seems to be generally approved, to require the affidavit of the moving party to be accompanied by the affidavit of the witness himself, or the absence of such affidavit to be accounted for. (*Pilot Rock Co. v. Chapman*, 11 Cal. 162; *Ib.* 199.)

If Card will testify to material facts which the defendant did not prove or attempt to prove on the trial, his evidence may be regarded as not cumulative.

My recollection of the evidence is that the defendant attempted to prove by Wilkins, that the plaintiff violently assaulted Card, without cause or provocation, and beat, bruised, and disabled Card and Wilkins. The other matters, which the affiant says he expects to prove by Card, are either conclusions, or facts that are admitted by the plaintiff, except the allegation that, "There had before that time been a difficulty between the plaintiff and said Card, and the plaintiff had repeatedly made threats of violence against said Card."

The threats are referred to *only on the belief of the party*, without alleging any knowledge or even information from Card or any one else. This detracts from the force of the statement. (11 Cal. 162, 199.)

A party should be free from *laches* in not having moved for a continuance.

It is a general rule that the existence of the evidence must have been unknown to the party at the time of the trial; and the circumstances should not leave an inference that reasonable diligence would have discovered it. (*Davis v. Tyler*, 18 John. 489; *Jackson v. Molin*, 15 John. 293.)

The trial has disclosed that the affiant, before the trial, was acquainted with both Wilkins and Card; knew that they were both engaged in the difficulty; that they were intimate acquaintance, and all that is disclosed indicates that the affiant probably knew as much as he does now of the nature of the evidence to be obtained from Card. He says he inquired in Washington County, and elsewhere, for Card; but he does not show that he inquired of Wilkins; nor does he name any other acquaintance of Card's. He says he heard a variety of reports as to Card's whereabouts; but he does not show that he followed them up, or that they were not correct.

The use of the word diligent, in his statement of inquiry, adds but little, if anything, to the force of his statements; for it is not admissible that he should judge what acts or what extent of inquiry amounts to diligence. It is not sufficient that he depose in terms "that he has made diligent inquiry;" the affidavit should state facts. It is equivalent to saying that he has made inquiry to such extent that he

thinks that he should be regarded as diligent. The question must be determined by a consideration of specific acts deposed to.

I think it should be shown that he applied to parties most likely to be informed about Card and his affairs; and if he obtained "reports" or information from them, it should be shown with what results he followed up the information.

It does not appear from this affidavit but that ordinary efforts would have enabled the defendant to learn the residence of Card, and to have procured his deposition before the trial. A new trial must be denied.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1868.

F. BROWN v. EDWARD CAHALIN.

PROOF OF CONSIDERATION.—An acknowledgment of payment of purchase money contained in a deed or bill of sale may be explained by parol. Parol evidence is admissible to show that the consideration expressed in a deed was not the actual consideration.

CIRCUMSTANTIAL EVIDENCE.—When the action was for an agreed price, and the evidence was conflicting as to whether that price was agreed to, the actual value of the property sold was admitted as a circumstance tending to disprove the alleged agreement. Proof of the state of accounts was admitted as circumstantial evidence tending to contradict a claim of payment by a release of prior indebtedness.

NEW TRIAL.—Where it is evident that the jury have disregarded instructions, to the detriment of a party, it is ground for a new trial.

THE plaintiff alleges that he and the defendant were partners, owning a building and a stock of goods; that the parties dissolved the partnership, and that he sold his interest in the building, the goods and the business to the defendant for the sum of fifteen hundred dollars, which sum the defendant promised to pay him upon request, but had only paid \$35, and, although requested, refused to pay the balance, \$1,465.

The *answer* admits the purchase of the building and goods, but denies that the defendant promised to pay

therefor \$1,500, or any sum ; but says that at the time of the dissolution the plaintiff was indebted to the defendant in a large sum, and that the two, as partners, were indebted to divers other persons ; and that the building and goods were sold to the defendant solely upon the consideration that the defendant would release his claims for money owing to him from the plaintiff and would assume the debts owing by the firm ; that the defendant did so release the plaintiff and assume said firm debts, and thus fully paid the plaintiff for all his interest in the building, goods and business.

The replication denies the allegations of the answer.

W. W. Page, for the plaintiff.

Stout & Reed, for the defendant.

A jury being called and sworn, the plaintiff introduced a deed and bill of sale executed by him to the defendant. The deed recites that the consideration for the building is one thousand dollars, and admits its receipt by the plaintiff, and the bill of sale recites a consideration of \$500 for the goods, and admits that the amount was received by the plaintiff.

The plaintiff introduced as a witness an attorney, who drafted the deed and bill of sale ; and after proving that he was the person who drew them, asked : "What can you state as to the amount of money paid at the time of the transaction?"

The defendant objected that the plaintiff having introduced the instruments could not dispute them.

The objection was overruled, and the witness testified : "No money was paid at the time. The parties came together to my office, and said they wanted a deed and bill of sale. When writing the deed I said—'What consideration shall I insert?' and one of them said, you may as well put in \$1,000; the other assented. When I was drawing up the bill of sale, a similar question was asked by me, and one of them mentioned \$500, and the other assented, or made no objection. I supposed the amount to be a mere

matter of form. Nothing else was said about money or the consideration."

The plaintiff testified that the defendant agreed to pay him \$1,500 for his interest in the property.

The plaintiff rested his case; and the defendant testified in his own behalf, that he never agreed to give any sum for the property, but that the business had been unsuccessful, and that the plaintiff had become indebted to him, and had consented and agreed to transfer the property to him, if he (the defendant) would release that indebtedness, and assume the debts owed by the firm. That the transfer was made in pursuance of that agreement and at the plaintiff's solicitation; that after the transfer was made and all their business settled up, he made the plaintiff a present of the \$35 mentioned in the pleadings.

The defendant's counsel asked what was the building, stock of goods and business worth?

The plaintiff objected to the evidence as incompetent and irrelevant. The defendant claimed that he could show that an undivided half of the whole was not worth \$300; and that it was a circumstance tending to show that \$1,500 was not an agreed price.

The evidence was admitted as a circumstance tending to show whether or not the \$1,500 was an agreed price.

Under similar objection and ruling, the plaintiff testified to the condition of the firm business, and the state of the accounts between the parties.

The jury was instructed, among other things, that the evidence of the value of the property, and of the state of accounts between the parties, was admitted solely for the purpose of enabling the jury the better to determine whether the defendant had promised to pay the plaintiff \$1,500 for the property transferred to him; and that unless the defendant had promised to pay that sum for the property and business, the plaintiff could not recover.

The plaintiff recovered a verdict for \$800.

The defendant moved for a *new trial*, assigning the following grounds:

1st. The plaintiff should not have been permitted to dis-

pute by parol evidence the admission of payment contained in the deed and bill of sale.

2d. It was error to allow the plaintiff to go into evidence of the condition of the accounts prior to the dissolution and sale.

3d. Insufficiency of the evidence to justify the verdict.

4th. The verdict is against law.

5th. That the jury disregarded the instructions of the Court.

The motion submitted, and taken under advisement, the following opinion was filed granting a new trial.

UPTON, J. The first objection is not well taken; it is a general rule that a written receipt may be explained by parol. And the general rule that a party is not permitted to dispute his own deed, is subject to the exception that a party may show that the consideration expressed in the deed is not the actual consideration, whenever that becomes a material point.

There is equal reason for permitting a party to show that the acknowledged payment has not been made. It is an everyday practice to state a nominal consideration in deeds; and it is equally common to allow the deed to contain a formal acknowledgment of payment when none has been made. Where one takes a deed and gives his promissory note, or a note and mortgage, to secure the price, nothing is more common than for the deed to recite that full payment has been made, and the acknowledgment of payment contained in the deed is considered open to explanation.

The second ground of this application is the admission of evidence of the state of the accounts between the parties up to the time of the dissolution.

It would have been clearly error to permit the jury to understand that they were to find by their verdict what would have been a fair settlement; this action being for money due upon an express promise to pay a specified sum. But the jury were instructed that the plaintiff could not recover unless fifteen hundred dollars had been agreed

upon by the parties. It appears to me that the actual value of the property, and the question whether or not the plaintiff was then indebted to the defendant, are each distinct matters of fact, tending to show which of the parties told the truth, in narrating what occurred at the time of the dissolution. And I think this was properly permitted to go to the jury as circumstantial evidence tending to ascertain the truth in regard to the principal question in issue.

Upon the fourth and fifth grounds, I think the verdict should be set aside. There was no evidence tending to show that more than \$35 was paid by the defendant at or after the sale of the property. And if the plaintiff established the fact alleged in the complaint, that the defendant promised to pay \$1,500 for the property and business assigned, he was entitled to recover at least \$1,465. The jury returned a verdict for \$800; and the conclusion is irresistible that the jury disregarded the instructions given, and attempted to determine a matter that was not in issue. That instead of passing upon the question of fact, whether the defendant made the purchase at an agreed price of \$1,500, the verdict was rendered with a view to determine thereby what was the probable value of the property, or what would have been equitable terms of settlement at the time. The instructions were explicit, that the plaintiff could only recover upon proof of the alleged settlement. That if a settlement was in fact made, all previous demands were canceled by, or merged in, the contract of settlement. Where it is evident that the jury, whether intentionally or inadvertently, have disregarded instructions to the detriment of a party, it is ground for a new trial.

The verdict should be set aside.*

* The cause was subsequently retried; and the plaintiff had a verdict for \$1,465.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1868.

JAMES B. STEPHENS v. JOSEPH KNOTT.

Where S. has a contract with K., the owner of a ferry, that S. and his family shall have their ferryage free; and S. owns land on which there is a saw-mill and growing timber, and contracts with N. that N. shall use the saw-mill and saw the growing timber at N.'s expense and cost; and S. shall convey the lumber from the mill across the ferry and sell it, and the two shall divide the gross proceeds equally; and S. hires G. to haul the lumber across the river at the ferry for \$3 per thousand—the ferryage of the lumber across the river is not the ferryage of S., and K. is not obliged to ferry the lumber free of charge.

Logan & Shattuck. for the plaintiff.

D. Fredenrich, for the defendant.

IN March, 1861, the plaintiff sold to the defendant the ferry across the Willamet river at Portland. As a part of the consideration of the sale and transfer, the defendant stipulated "that the said James B. Stephens, party of the first part, and his family shall have their ferryage free from all charges and demands forever."

Stephens was then a farmer, having a family, and having teams and some employees at work on his farm. In 1867 he purchased a saw-mill, and contracted with a Mr. New that New should cut and haul the logs from timber growing on Stephens' land and saw them at the mill at his own expense. Stephens, at his expense, should take the lumber at the mill, convey it to Portland and sell it, and after sales, New should have one half of the gross proceeds and Stephens the other half. Lumber was cut in pursuance of the contract, and Stephens sold to a Mr. Guild teams, upon consideration that the teams should become the property of Guild when Guild should pay the agreed price thereof to Stephens, by hauling said lumber from the mill to Portland at an agreed price of \$3 per thousand, Stephens engaging to Guild that the ferryage was paid for and should cost Guild nothing. Guild commenced hauling the lumber, and the defendant refused to permit Guild to cross with

the lumber on the ferry, without payment. Stephens paid, under protest, the usual rates of ferryage, and he brings this action to recover back the money so paid and damage for detention and delays thus caused.

Logan & Shattuck, for defendant, claim :

1. That this is not the business of Stephens, or of Stephens and his family.

2. That it is not the ferryage of Stephens, but of the party who engaged to haul the lumber.

3. That it is not the ferryage of Stephens, but that of Stephens and Mr. New.

4. That the true meaning of the contract is, that Stephens was to have the amount, or at least the kind of ferrying done, that was consistent with the business in which he was engaged at the time of taking the contract.

The cause was tried without a jury and the following decision was rendered :

UPTON, J. Whether Guild, while hauling lumber by the thousand, shall be considered as a principal in the business of hauling the lumber, that is, as doing business for himself; or as the agent of the plaintiff Stephens and doing the business as an agent, is one of the questions to be determined. For some purposes he would necessarily be considered an agent, and for other purposes it is equally certain he is a principal. He was a bailee of the lumber, and therefore an agent; for the idea of agency is necessarily involved in every bailment.

But in the business of hauling lumber and the profits to be made from it, when considered abstractly from any consideration of ownership of the lumber, he was acting as a principal.

Then how is the owner of a ferry authorized to look upon and treat such a business? What would be the respective rights and liabilities of Stephens and Guild if dealing with a ferryman who had no contract with either of them? Would the ferryman upon demand being made by Guild, be bound to take notice of the relations existing between Stephens

and Guild? If Guild used the ferry and refused payment, could the ferryman recover the toll in an action? And could Guild defend by pleading against the ferryman, that Stephens was the party demanding the use of the ferry?

It was said in argument that because Stephens and Guild had expressly agreed that Guild should pay no toll, the business of hauling still continued the business of Stephens. That Guild could not be under any obligations to pay on Stephens' lumber, when by the very terms of his employment it had been agreed that Stephens should discharge that duty.

This position is not well founded. Knott was not a party to the contract between Stephens and Guild, and a mere agreement between the latter two, that the ferrying should be done on Stephens' account, would not increase or change Knott's liabilities or obligations. As between them, or either of them and Knott, that agreement did not give or take away any rights. Knott's right to charge ferryage depended upon the question, whose business was the transportation of the lumber. If Guild became principal in the business of hauling, then it was no longer Stephens' business; and Stephens could not bind defendant, Knott, except in regard to Stephens' business; or, in other words, Stephens' ferrying.

On the next ground of defense urged, we are to inquire whether conveying lumber to Portland (if it had been done without the intervention of Guild) would be considered the business of Stephens, or the business of Stephens and another. If the latter, it must be conceded that it is not within the contract. "Where two or more persons place, their money, effects, labor and skill, or some or all of them, in business, with an understanding that each is to share in the profits; one may contribute labor or skill, another property, and another money, according as they shall agree." The business is a partnership.

In this case the parties were each to have half the gross proceeds of the lumber. Stephens contributed the growing timber, the use of the mill for the term of the partnership, and the labor and expense of hauling the lumber to town. Mr. New contributed the labor and expense of cutting and

hauling the timber, manufacturing the lumber, and keeping the mill in repair. The business of converting the standing trees into money by the process agreed upon, was a business interesting to, and enlisting the energies and efforts of each of these parties, one as well as the other, from which both were to derive profit. If it was the business of Stephens it was also the business of Mr. New. Independent of any strict definitions, it was a business in which they were jointly interested, and they jointly shared the profits, and consequently it was a partnership business.

But it is claimed that Mr. New's labors upon, and his possession and control of the lumber ceased at the mill, and that by their contract the matter of carrying it to Portland was the sole business of Stephens.

If it were true that Stephens' agreement that he would carry the lumber across the river, made that the sole and individual business of Stephens, it is difficult to see why the contract with Mr. Guild, that Guild would carry it by the thousand, did not again change the matter, and make its carrying to Portland the sole business of Mr. Guild.

If the plaintiff's position can be sustained, Mr Stephens could contract with one set of men to chop and deliver on the east side of the river all the cordwood that could be sold in Portland, and with another set to haul it all across the river, and thus appropriate the cost of ferrying; or, he could contract to carry all the freight of the country across for a percentage on the value.

It will hardly be contended that the plaintiff Stephens could enter into the business of forwarding freight, and contract with the railway company to receive its freight at the east side of the river and convey it to the west side, and there collect all the charges, and return to the company a specified share thereof; and thus, having contracted with other parties to do the wagoning at a certain rate per ton, compel the defendants to pass the wagons over the river free of charge.

Yet the difference between that proposition and the one at bar is, that in that case Stephens and the railway company would not have the general property in the goods car-

ried, while in this case he and New have a general property in the lumber.

The lumber is no more the separate property of Stephens when it is crossing the river, than it is the separate property of New when it is passing through the saw-mill. When in the course of this business the trees are severed from the realty, and the logs are being brought to the mill, they have become the personal property of Stephens and New, and they so remain until, being converted into lumber, they are sold.

I can not doubt but that New is a partner in the whole business of manufacturing the lumber, conveying it to market and selling it. If logs are lost before they are sawed, and the quantity of lumber to be made is thereby diminished, or if lumber is lost while being transported, or if sales are made at reduced price, or the lumber is sold to irresponsible parties, both Stephens and New suffer diminution of profits by the circumstance.

The fact that it is a special partnership does not affect the main question. If Stephens could make the hauling his individual and sole business, by agreeing that he will personally do the hauling for the whole business, or do it at his own expense, he can make the carrying of any man's freight his ferrying by agreeing to do it at his own expense. But this point is conclusively disposed of so far as this case is concerned, by the circumstance that Stephens hired Guild to haul the lumber across the river at a certain rate per thousand. (1)

(1) The decision in this case was reversed on appeal to the supreme court. No written opinion has been filed in that court; but it would seem that a reason was found for holding that Stephens' agreement to furnish the mill and the standing trees, and to transport the lumber for half the gross receipts, made the work Stephens' individual business, while Guild's agreement to transport, for a specified sum per thousand, did not make the transportation Guild's individual business.

CIRCUIT COURT FOR MULTNOMAH COUNTY, AUGUST 26, 1868.

AT CHAMBERS.

CHANCY BALL v. J. H. LAPIUS, CITY MARSHAL.

MANDAMUS.—Mandamus lies to compel an officer to perform an act which the law specially enjoins as a duty resulting from his office.

IDEM.—An ordinance passed in 1862, directing the city marshal of the city of Portland "to procure at the cost of the city" * * * * "a small-pox hospital, the selection to be subject to the approval of the committee on health and police," does not impose such an official duty on the present city marshal as will be enforced by mandamus.

IDEM.—Mandamus is proper only where a party has a legal right, and there is no other appropriate legal remedy.

IDEM.—The right must be certain, and clearly made out by the facts of the case.

DISCRETION.—The granting or refusal of the writ is discretionary.

PETITION for writ of mandamus.

THE petition alleges that one Adam, "a small-pox patient", is, and for six days has been, lying and being in a tenement building immediately adjoining the place of business of the petitioner in the city of Portland; that the locality is thickly populated with men, women and children, and there is great danger of said disease spreading among the people. That the business of the petitioner, and business generally in the vicinity has been suspended by reason of the presence of said disease.

The petition cites a city ordinance passed in 1862, which ordains: 1st. "That the city marshal be, and he is hereby, required to procure, at the cost of the city, a suitable building at or near the outskirts of the city, for the purpose of a small-pox hospital, the selection to be *subject to the approval* of the committee on health and police."

2d. "That the said marshal be, and he is hereby, further required to have removed, without delay, to said hospital any and all small-pox patients that may hereafter occur in this city."

A third section requires the marshal to procure medical and other attendance. The petition charges that the defendant is marshal of the city, and that, being requested, he refused to remove the patient.

UPTON, J. filed the following opinion:

The writ of mandamus lies to compel an officer to perform an act which the law specially enjoins as a duty resulting from an office trust or station.

It may require the officer to proceed to the discharge of any of his functions, although such discharge involves an exercise of discretion and judgment, and a choice between different modes of proceeding; yet "it shall not control judicial discretion." And it is safe to go further, and say it shall not control discretion, judicial or otherwise, which the law assigns to an officer. (*Judges of Oneida v. People*, 18 Wend. 97.) In such case the office of the writ is to compel the officer to act. The mode of acting is still to be determined by him in whom the law has lodged the discretionary power.

In determining on the necessity and propriety of the writ, it must be observed:

1st. Mandamus is proper only where a party has a *legal* right, and there is no other *legal* remedy. (*Ex parte Nelson*, 1 Cow. 423; 2 Hill, 45.)

2d. The right must be certain, and clearly made out by the facts of the case. (*People v. Supervisors Chenango*, 1 Kern. 563.)

3d. The granting or refusing of the writ is discretionary. (*Van Rensselaer v. Sheriff of Albany*, 1 Cow. 512.)

If it were established clearly that the law enjoined upon the defendant a positive duty to remove every small-pox patient to some known hospital now in existence, the case would present no difficulty. A writ would necessarily be issued upon refusal to perform the act enjoined. And if it was certain that the law enjoined upon him the duty, and gave him the power, to provide a hospital; upon refusal he might be compelled by mandamus.

It is not alleged in the petition that there is a hospital, and, consequently, it must be assumed that there is not. This leads us to consider whether the marshal has power, and whether it is by law enjoined on him as a duty, to provide a hospital.

The construction of the ordinance is open to doubt. It is not clear from its language, whether it intended more than to require of the marshal in office in 1862, to procure a building. And I think it not a fair interpretation of the language to hold that that marshal from time to time, and each successive marshal, is empowered by it to provide a new hospital, as often as the one provided shall be destroyed, or as often as from any cause the city shall lack one.

Aside from this question, the marshal's selection is made "subject to the approval of the committee on health and police." The marshal, then, is not empowered, on his own motion and according to his own judgment, to procure a hospital. His selection is subject to the approval or disapproval of another power. The city charter clothes the city council with power "to make regulations to prevent the introduction of contagious diseases into the city, and to remove persons affected with such diseases therefrom to suitable hospitals."

The ordinance shows that it was not the intention of the council to divest themselves of control of this subject; but, on the contrary, the selection is subject to the approval of one of their committees, which is, in reality, holding it still under the control of the council, the committee being a constituent part of that body. It is true the council can not delegate their power to a committee, but if the committee approve, and so report to the council, the express or tacit assent of the council to the approval being had, it will be treated as the action of the council.

If, then, the marshal should make all possible effort, he has no power even to procure a hospital independently of the council.

I think it extremely doubtful whether the petition shows either that the marshal has the power, or that it is a duty enjoined on him by law to procure a hospital.

Generally a court does not take judicial notice of facts not shown by the record. But, as this class of applications has ever been considered addressed to the discretion of the court, and as it is in the first instance *ex parte*, I think it not unreasonable to revert to facts that are within the knowl-

edge of the court, and may be ascertained by examining its records and files in other cases. It is shown by those records, that shortly after the passage of this ordinance, a former marshal procured a hospital building, in pursuance of the provisions of the ordinance, which was used for hospital purposes by the city, and which has since been destroyed; and that the council refused to approve certain of the marshal's proceedings in that matter.

It is not certain, if the marshal should attempt to select another building, that the council would approve his act; and yet the petition asks that the marshal be compelled to select a building and remove the patient to it, on his own responsibility. The petition does not propose that he should simply select a building and report the selection to the council. In fact, that course would evidently be too dilatory to meet the wants of the petitioner. A mandamus should not be granted where it would be unavailable. (*People v. Supervisors of Green*, 12 Barb. 217; 13 How. Pr. 305; 11 Id. 89.)

The subject of contagious diseases has by law been confided to the discretion and judgment of the city council, and a mandamus should not be granted to control that discretion. It should not be resorted to in this connection, unless it is clearly shown that there is an evident neglect of duty or violation of law.

The writ must be denied.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1868.

F. DUFERNOY v. JACOB STITZEL, SHERIFF OF MULTNOMAH COUNTY, *et al.*

GARNISHEE.—A. recovered judgment in this court against D. in a civil action for a sum of money, and thereupon, in a proceeding in which V. was served with garnishee process, A. recovered a judgment against V. for an indebtedness alleged to be due from V. to D. In pursuance of the judgment against D. the latter was imprisoned for want of payment. An execution was issued against V., and V. paid to the sheriff the amount adjudged against him, under protest, and then appealed his case to the supreme court. *It was held*, that the money paid by V. must be applied on the execution against D., notwithstanding the protest and appeal.

J. B. MAYERAN obtained a judgment for something over \$2,900 against the petitioner, F. Dufernoy, in a civil action in this court, and it was adjudged that in default of payment the defendant be imprisoned. Process in the nature of garnishee having been served on Leon Vial, the said Mayeran obtained a judgment against the said Vial, to the amount of \$2,600, on account of money alleged to be due from said Vial to said Dufernoy. Execution was issued on each of these judgments, and placed in the hands of the defendant, Jacob Stitzel, sheriff of Multnomah County, in whose custody said Dufernoy is now detained by the execution in the first named case. The other execution being levied on the property of said Leon Vial; Vial paid the said sheriff the full amount of the judgment against him, protesting that said judgment was erroneous; and he immediately appealed that case to the supreme court, and notified the sheriff thereof. The defendant, Dufernoy, demanded that the money paid by Leon Vial should be credited on the execution upon which he was in custody, and he paid to the sheriff a sum equal to the difference between the two judgments. The sheriff returned the execution that had been issued against Vial and paid the money into the hands of the clerk, without making any endorsement on the other execution. Dufernoy, by his attorney, demanded, both of the clerk and of the sheriff, that the payment should be endorsed and applied on the latter execution, and that Dufernoy be released from custody. Both the sheriff and the clerk failed to comply with the demand, and Dufernoy now files this petition, praying for such application to be ordered, and for a writ of *habeas corpus*.

The cause was submitted for final judgment on the pleadings.

Wm. F. Trimble, Esq., for the petitioner.

Mitchell, Dolph & Smith, for the defendants.

UPTON, J. Sections 155 and 281 of the code, are applicable to cases where an attachment has been served; and these sections of statute make it the duty of the sheriff, in

ordinary cases, to apply money received by him for "debts due the defendant" on the judgment against the defendant.

It does not appear with certainty whether this property had been attached so as to bring the case (if this is to be treated as a payment) literally within the provisions of sections 155 and 281. But if the money is made on final process, without an attachment, the reason for the rule would be the same.

The fact that Leon Vial paid the money under protest, to avoid a forced sale of his property, and took an appeal, shows that he is disposed to test the question whether this is money paid or received "on a debt due the defendant." I confess that I have felt great doubt whether it was the duty of the sheriff to apply the money, notwithstanding the protest and appeal, as he would be bound to do if the judgment against Vial had become final.

Had the pleadings shown affirmatively what the grounds of the appeal were, and that there was a probability of the judgment being reversed, and that Vial has a good defense, the case would have presented still greater difficulties.

It does not affirmatively appear that the judgment against Vial is likely to be reversed, nor that the plaintiff in the original suit is in great danger of being left without remedy, if the judgment should be reversed and he be compelled to refund this money.

It does not seem just to hold the defendant in custody upon a mere supposition or possibility that the judgment against his alleged debtor is erroneous, and especially because the plaintiff has prosecuted his demand against Leon Vial to judgment, and has, to a certain extent, taken the responsibility of declaring there is no error, by accepting the judgment and issuing execution upon it. It will be ordered that the money be applied on the original judgment, without prejudice to the right of the plaintiff to move to set the credit aside, in case he is compelled to refund the money paid by Leon Vial.

[* *] Upon the residue of the judgment, in the original action, being satisfied, an order for the petitioner's discharge should be made.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1868.

STATE OF OREGON v. JOSEPH BERTRAND.

MALICE.—Where the proof shows that the killing was done voluntarily or intentionally, with a weapon which was intended for taking life, the use of that kind of a weapon raises a presumption that the killing was done maliciously.

BURDEN OF PROOF.—When such proof is made, unless the circumstances of the killing show that it was justifiable or excusable, the burden of proof devolves on the defendant to show an excuse or justification for the killing.

When killing with such weapon is positively proved, or proved beyond a reasonable doubt, it is not a ground of acquittal that the evidence fails to show whether or not the killing was justifiable.

The burden of proof, in such a case, rests on the defendant to show by a preponderance of evidence that the killing was justifiable or excusable.

THE defendant, Joseph Bertrand, was indicted for murder in the second degree, by shooting and killing Julius A. Meire with a pistol. The evidence disclosed that the homicide was committed in the store-room of the deceased, who was a grain merchant.

The room was filled with sacks of grain to a height of seven or eight feet, except that several walks or narrow alley-ways, were left between the piles of sacks, and there was a small open space about the desk, at which the deceased stood at the time of the homicide.

The evidence tended to show that the defendant at that time stood in one of the alleys, which was about two feet wide, and that he was about twelve feet from the deceased at the time the revolver was fired. The ball struck the deceased at the throat, and struck about the centre of the vertebral column, breaking the neck and causing instant death. No other persons were in the store-room at the time, but several persons came in immediately, and before the defendant went out. The position of the body of the deceased indicated that at the time of the shooting he had his hands in his coat pockets; that he had no weapon in his hand or in his coat pockets, but had a revolver in the pockets of his pantaloons. There was evidence that the deceased and the

defendant had been acquainted for several years, had formerly had business relations in California, about which the defendant was greatly dissatisfied, and that the defendant was here for the purpose of inducing or compelling the deceased to accede to some proposition about their former business affairs; and that a few days before the homicide, he had threatened personal violence against the deceased.

The only exculpatory evidence adduced on behalf of the defendant, was, that he came from the scene of the homicide toward the jail, with an avowed intention to surrender himself into custody, and that about thirty minutes after being placed in the jail, he complained of pain at his breast, and an officer, whose attention he then called, examined and thought a spot on his breast looked more red at that time than was natural.

M. F. Mulkey, District Attorney.

David Logan, for the defendant.

UPTON, J., among other instructions, gave the following:

If you are satisfied beyond a reasonable doubt that the defendant intentionally killed the deceased with a gun or pistol, the burden of proof devolves on the defendant. When the proof shows that the killing was done by a defendant voluntarily or intentionally, with a weapon which was designed and intended for taking life, the law raises a presumption from the use of that kind of weapon, that the party using the weapon intended to kill, and that the killing was malicious.

When such proof is made, unless the circumstances of the killing show that it was justifiable or excusable, the burden of proof devolves on the defendant to show a justification or an excuse for the killing.

In such case it devolves on the defendant to show that the killing was necessary, or to show such circumstances as render the act excusable.

The burden is on the state, in the first instance, to remove the presumption of innocence, and to show that the defendant did the acts that constitute the crime. But when the

state shows beyond a reasonable doubt, that a defendant purposely did the killing charged in the indictment, with a weapon that was designed for the very purpose of taking life, as soon as that point is established, the burden of proof changes, and the burden then rests upon the defendant. And if there is not proof to show that the act was justifiable, or to show that it was excusable, the defendant is not entitled to be acquitted for the lack of evidence on the subject of justification or of excuse. Where voluntary killing with a gun is fully proved, and some evidence is offered tending to show a justification or an excuse, if there is not a preponderance of evidence in favor of justification or excuse, the defense is not made out.

In this case the killing cannot be justified upon any other ground except that the killing was necessary, in order to prevent Meire, the deceased, from killing the defendant, or from doing him great bodily harm.

The killing is not excusable, unless on the grounds that it was done by accident in doing a lawful act, or "by accident or misfortune in the heat of passion upon a sudden and sufficient provocation, or upon a sudden combat without premeditation and without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner."

"If a person without malice, either express or implied, and without deliberation, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, voluntarily kill another," the act is manslaughter. If a person purposely and maliciously kill another, the act is murder.

The defendant was convicted of manslaughter.

S 64
S 134

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1869.

H. W. HEATH v. R. GLISAN AND R. B. WILSON.

LIABILITY OF A SURGEON.—A physician or surgeon is only responsible for ordinary care and skill, and for the exercise of his best judgment in matters of doubt. The words ordinary care and skill are here used in their common acceptation.

ORDINARY SKILL.—By ordinary skill is meant such skill as is commonly possessed by men engaged in the same profession.

SURGEON NOT LIABLE FOR ERROR IN JUDGMENT.—If the defendants possessed ordinary skill and used ordinary care, they are not liable for an error in judgment committed in a case presenting grounds for doubt or uncertainty.

EXPERTS.—Opinions of men skilled in a particular art or science are admitted to aid the judgment of the jurors.

MEASURE OF DAMAGES.—Either the plaintiff is entitled to recover full compensation for the injury, or the defendants are entitled to be wholly exonerated.

THE plaintiff, having received a severe injury at the elbow joint, was treated for the injury by the defendants as his physicians and surgeons; and he brings this action alleging want of proper treatment for the injury, claiming damages to the amount of \$50,000.

The defendants (although not partners) answered jointly, denying the allegations of the complaint, averring that they treated the case with care, skill and diligence, and alleging negligence on the part of the plaintiff. These averments were met and denied by a replication.

On the trial the injured arm was exhibited, being in a condition of permanent dislocation at the elbow. The principal matters of fact controverted on the trial were the following: Was there a fracture? If a fracture, where, and to what extent? Was the dislocation ever reduced? Were the parts in apposition at the time the plaintiff resumed his labor? If the injured limb was reduced, did re-dislocation occur before or after the defendants had ceased to treat the case? Could re-dislocation have been produced by involuntary muscular contraction? Was the plaintiff guilty of negligence contributing to the want of successful treatment?

The proofs showed that the plaintiff was a young man who had engaged successfully in a lucrative business, requiring his personal labor and the use of his hand that was now disabled. And that the defendants were physicians and surgeons of high standing in their profession. Many surgeons were examined as experts, and the evidence is too voluminous to be inserted.

Messrs. Coples and Cronin, for the plaintiff.

Messrs. Strong, Mitchell and Page, for the defendants.

UPTON, J. The court gave the following instructions to the jury:

Inasmuch as it devolves on you to decide all disputed questions of fact involved in the case, it is important that you clearly understand, and constantly keep in mind, what questions of fact are in dispute between the parties. It will aid you in your deliberations if you carefully observe what rules are established, to determine the liabilities of physicians and surgeons in cases of this kind. The rules of law applicable to the subject are settled and established with a good degree of certainty, for this is not a new subject and the rules are not new. It is charged by the plaintiff, "that the defendants failed to treat the plaintiff's injury in a skillful and proper manner." That "through ignorance or otherwise, the defendants mistook the nature of the plaintiff's injury, and treated the plaintiff for injuries he had not received."

The defendants claim that they treated the case in a proper manner, and with care and skill.

This is a civil action for damages, and the facts are to be determined by you, according to the preponderance of evidence. The rules of law that regulate the duties and liabilities of physicians and surgeons, in cases of this kind, may be stated as follows:

"A physician or surgeon is only responsible for ordinary care and skill, and for the exercise of his best judgment in matters of doubt. He is not accountable for a want of the highest degree of skill. And in determining whether

the practitioner possesses ordinary skill, regard must be had to the advanced state of the profession at the time.

“An action does not lie where it appears that the plaintiff refused to coöperate with the practitioner, and to conform to his prescriptions.” (a)

The first question of fact in the case, is this. Were doctors Glisan and Wilson possessed of ordinary skill, and did they exercise ordinary care and diligence in treating the case?

The words ordinary skill and ordinary care, are here used in their common acceptation and meaning, and they should be so understood and construed by you.

By ordinary skill, is meant such degree of skill as is commonly possessed by men engaged in the same profession.

If, under the circumstances of this case, the nature of the plaintiff's injuries could have been ascertained by ordinary skill, and by the exercise of ordinary care and diligence, and the defendants, either for want of ordinary care, or of ordinary skill, mistook the character of the injury, and thereby failed to make a perfect cure, which otherwise might have been made, they are liable. But if they possessed ordinary skill, and use ordinary care, they are not liable for an error in judgment, committed in a case presenting ground for doubt or uncertainty.

When you retire for deliberation, among the questions of fact that will present themselves to your minds, these are some of the most prominent. Did the defendants possess ordinary skill in their profession? Did they treat the case with care? Was the arm fractured? If there was no fracture, was it clear or was it doubtful to surgical skill, whether there was a fracture? If the arm was not fractured, and ordinary skill and care would have discovered that fact, was the treatment proper to be used in a case, where there was no fracture?

In determining whether the defendants possess ordinary professional skill, it is proper to consider the evidence in regard to their education, the time, and greater or less ex-

(a) Wharton v. Stillé, Med. Jurs., 1273.

tent of their practice and experience in the profession, as well as other evidence touching the question.

On the question whether the defendants used ordinary care in treating the plaintiff's case, all the evidence that tends to show what degree of attention they gave to the case, should be considered by you, as well as the proof of their mode of treatment, and the testimony of physicians and surgeons as to what is proper treatment. The opinions of men skilled in a particular art or science may be resorted to with propriety in all cases where the question involved depends on skill and science in a particular department. "Some questions lie beyond the scope of the observation of men in general, but are quite within the experience and observation of those whose peculiar pursuits and professions have brought that class of facts frequently and habitually under their consideration." "And such opinions, when they come from men of great experience and in whose correctness and sobriety of judgment just confidence can be had, are of great weight and deserve the respectful consideration of a jury. But the opinion of a medical man of small experience, or of one who has crude and visionary notions, or who has some favorite theory to support, is entitled to very little consideration. The value of such testimony will depend mainly upon the experience, fidelity and impartiality of the witness who gives it." (b).

In determining whether the practitioner possesses ordinary skill you are to consider the degree or condition of advancement of the medical profession at the time the case was treated.

In cases where it is doubtful which of two or more modes should be pursued, the practitioner must exercise his best judgment.

If the evidence shows that the defendants did not possess ordinary skill or did not use ordinary care, or in case of doubt, that they did not use their best judgment, and that for one of these reasons they failed to cure the plaintiff, they are liable. If the evidence does not show such failure

(b) Wharton & Stillé, S. 95, N.

on their part, the defendants are not liable in this action, even though they may have erred in judgment. The provision of law, that a case of doubt only requires of the practitioner ordinary skill and care and the exercise of his best judgment, is founded upon the great truth in nature, that there are injuries and diseases that baffle the skill of the most learned and most experienced of physicians and surgeons. If the faithful and skillful physician were liable to answer for every error of judgment, it would place the medical profession beyond the reasonable protection of the law. Every death that occurs under the care of a faithful and skillful practitioner, is proof that there is a limit to medical skill and power.

The object of the law is, on the one hand, to guard the patient against the wrongful practices of ignorant or negligent men, who set themselves up as physicians or surgeons, and on the other, to protect the faithful practitioner of ordinary skill from loss either in character or in his purse, on account of matters for which it would be unreasonable to hold him responsible.

You are to decide all questions of fact involved in the case, unbiased by sympathy or by regard for either party, according to your convictions of the truth. And you are not at liberty to swerve from those convictions by assenting to a compromise that is contrary to what your convictions of the truth justify.

Either the plaintiff is entitled to recover compensation for the whole injury he has suffered by the fault of the defendants, or the defendants are entitled to be wholly exonerated. It is the right of each of these parties that the case should be determined upon the evidence and according to the law. It is the duty of each juror carefully and patiently to canvass and consider the evidence, in all its bearings, with an honest and conscientious effort to reconcile any difference that may exist between him and his fellow jurors, as to the truth of the matters put in issue, and with a willingness to adopt the views of his fellow jurors, when he can see that they accord with the law and the evidence. But it would be a gross wrong to one or the other of these parties,

to carry the spirit of compromise to the extent of yielding to that which you do not believe to be true, and to render a verdict merely for the sake of compromise, that you do not believe to be in accordance with the truth.

The jury, after being out forty-eight hours, failing to agree, were discharged without a verdict. (b)

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1869.

STATE OF OREGON v. JAMES CONALLY.

SELF-DEFENSE.—The law of self-defense does not justify one in following up his adversary after the immediate danger has ceased.

REASONABLE DOUBT.—Reasonable doubt defined.

BURDEN OF PROOF.—When the prosecution has established beyond a reasonable doubt that the defendant has killed the person slain, by means of purposely shooting him with a gun, the burden of proof is thrown on the defendant to prove any additional facts that may tend to justify or excuse the killing.

IDEM.—In that case, if the evidence of the prosecution does not show facts or circumstances tending to justify or excuse the act, the burden of proof being thrown upon the defendant, the rule in regard to reasonable doubt does not apply to justification or excuse; but the defendant must show by a preponderance of evidence that the killing was justifiable or excusable.

JUSTIFICATION.—One may use all necessary force to prevent a forcible entry into his house, but he has no right to use unnecessary force; and if he unnecessarily follow and shoot the party, after he has ceased to attempt to enter, the attempt forms no justification.

PREPONDERANCE.—The question whether the killing was necessary in order to prevent a felony, is to be determined by the preponderance of evidence.

REASONABLE DOUBT.—Yet, if the jury, upon the consideration of the whole of the evidence, entertain a reasonable doubt as to whether shooting the deceased was unlawful, they must give the prisoner the benefit of that doubt, and acquit him.

A. C. Gibbs, District Attorney.

(b) At the June term, 1869, the case was again tried, in substantially the same manner as at the first trial. The charge to the jury was the same. It is understood that on the first trial the jury stood: two for a verdict of \$50,000 in favor of the plaintiff, and ten for the defendants. On the second trial it is said the jury stood: six for giving the plaintiff some large amount (the amount not determined upon), and six for the defendant. Before the commencement of the following term the case was withdrawn.

— *Bronaugh, Esq.*, for the defendant.

THE defendant was indicted for the homicide of William B. Hill, and charged with murder in the first degree.

The evidence tended to show that Mrs. Hill, the wife of the deceased, because of a quarrel, or abusive conduct of her husband, had left her own house recently, and gone to the house of the defendant; that not many hours after her doing so, her husband called at the house to see her, and was denied admission, or at least refused permission to take his wife away. This was at an early hour in the evening. That the deceased went away; and one or two hours afterwards returned, and again sought to see his wife. That his manner was violent, and that considerable angry altercation took place between the deceased and the defendant and the defendant's wife. There was some evidence offered tending to show that the deceased attempted to force his way into the house, the door of which was several yards from the sidewalk. Before any shot was fired, the deceased had gone out of the yard on to the sidewalk. It appears that both the defendant and his wife had come out of the house, and that the deceased, while standing on the sidewalk, was fired upon by the defendant and killed; the weapon being a gun that had been brought to the defendant's house within a few days. The shot produced instant death. A revolver was found on the person of the deceased.

Many of the instructions asked on behalf of the defendant are embodied in the general charge. Of those asked on the part of the defendant, the court *declined* to give the following:

"A man has no more right, under the laws of Oregon, to commit an assault and battery upon his own wife than upon any other person.

"If the jury believe that Mrs. Hill, the wife of the deceased, having reasonable ground to apprehend personal violence at the hands of her husband in the nature of cruel beating and whipping, had on the night of the killing sought a temporary refuge from such violence in the house of the prisoner, and that the deceased sought her out and followed

her up, with the apparent design of abusing her by blows, in said house, or of forcing her by violence and against her will, to return to the house of the deceased, then either the prisoner or Mrs. Conally, the wife of the prisoner, had the right to compel deceased to leave the house, and to prevent his return into it while he evidently remained in the same humor.

“That if, after being induced by artifice or force to leave the house of the prisoner, the deceased went away, and procuring a pistol, armed himself with the same, and then returned to the house of the prisoner with the intention or apparent design of effecting an entrance into the house by force, or by intimidating the prisoner and his family, in that case the prisoner had a right to repel force by force even to the extent of taking the life of the deceased, if the conduct of the deceased was such as to give the prisoner reasonable cause to apprehend great bodily harm to himself or his family.

“That a man has by law as good right to defend the person of his wife as his own person from violence at the hands of another; and if the jury believe from the evidence that, at the time of the killing, the prisoner had reasonable cause to believe, and did believe that the person of his wife was in imminent danger of great bodily harm at the hands of deceased, then the prisoner had the undoubted right to slay the deceased in order to ward off the apprehended mischief.

“That in arriving at a conclusion as to whether the prisoner had reasonable grounds for such apprehension, the jury have a right to consider the character of deceased for violence as it may appear from the evidence; also so much of his brutal treatment of his own wife as may be shown by the proof, to have been known to the prisoner; also the acts of deceased and threats made by him against the prisoner within an hour or such matter prior to the killing, as well as the conduct of deceased at the time the shooting occurred.”

URTON, J., at the request of defendant's counsel, reduced the instructions to writing. The charge was as follows:

GENTLEMEN OF THE JURY:—The defendant stands charged with the crime of murder.

The killing of one human being by another may be either murder in the first degree, murder in the second degree, or manslaughter; or the act may be either justifiable or excusable.

When a defendant is indicted for murder in the first degree, the defendant may be found not guilty, or he may be found guilty of manslaughter, or of murder in the second degree, or he may be found guilty of murder in the first degree, according as the evidence shall establish the facts.

It, therefore, is important carefully to examine and consider what is the law in regard to the several degrees of criminality, and as to what constitutes an excuse or a justification, in cases of homicide.

(The court here read from criminal code, ss. 502, 503, 506, 515, 517, 518.)

To prevent the commission of a felony upon the person killing, or upon his wife, parent or child, master or mistress, or servant, is a justification.

A felony is a crime, punishable in the state prison. One has no right to kill his adversary, to prevent a simple assault, or simply to prevent a person from entering his dwelling house, but only when it is necessary to prevent the commission of a felony.

When a person is attacked by an armed man, who seeks to shoot him with a gun or pistol, and the person attacked is not the aggressor, and is not in fault himself, he is not obliged to wait until his adversary has actually aimed his weapon, if the danger is imminent and there is no way to avoid it except by force. But if he follows up his adversary, when his adversary has retired, and when it is not necessary to follow him up, and then shoots him, the fact that the party killed was armed, and even had his pistol drawn, will not be a justification.

The law of self-defense does not justify one in following up his adversary, after the immediate danger has ceased, and then killing him. Such a law would make every man his own avenger.

In a criminal case, a defendant is presumed to be innocent, until the contrary is proven.

Before he can be convicted, his guilt must be established by evidence, beyond a reasonable doubt.

If the jury have a reasonable doubt as to what degree of crime has been established, the defendant is also entitled to the benefit of that doubt, and a defendant should not be convicted of any degree of crime, in regard to the commission of which, the jurors entertain such reasonable doubt.

A reasonable doubt is one that exists in the mind after a full and careful examination and comparison of all the evidence, and one that is consistent with the facts that are fully proved to the satisfaction of the jury. The doubt must not be an unreasonable one, nor a mere supposition inconsistent with the evidence which you credit and believe.

If from the evidence you feel that degree of certainty, in regard to a matter of fact, upon which you would feel safe in acting in your most important undertakings, such matter of fact is established beyond a reasonable doubt, and it is the duty of the jury to act upon such conviction and decide accordingly.

If the killing was not justifiable or excusable it was unlawful, and if it falls below the crime of murder and was yet unlawful, the act was manslaughter.

A bare fear that the deceased was about to commit a felony, will not justify a killing. It must appear that the circumstances were such as to excite the fears of a reasonable man, and that the slayer really and in good faith acted under the influence of those fears and not in a spirit of revenge.

If the prosecution has established beyond a reasonable doubt that the defendant has killed the person slain, by means of purposely shooting him with a gun, the burden of proof is thrown on the defendant, to prove any additional facts or circumstances that may tend to justify or excuse the killing. In that case if the evidence already adduced do not show facts or circumstances tending to justify or excuse the act, the burden of proof being thrown on the defendant, the rule in regard to reasonable doubt does not apply to justification

or excuse, but the defendant must show by a preponderance of evidence, that the killing was justifiable or excusable.

It does not devolve upon the prosecution to show beyond a reasonable doubt that the act was not done in self-defense, if it is proved beyond a reasonable doubt that the killing was done purposely, by shooting with a gun. If the prisoner defends on the ground that the deceased was making an attack on him or his wife, and that there was no other mode of escape, you will decide that matter according to the preponderance of the evidence for or against that position. In such a case the question whether the killing was actually necessary at that time, to prevent a felony, or whether the defendant really believed that the killing was absolutely necessary to prevent the deceased from committing a felony, is to be determined by the preponderance of evidence.

Human life should be held sacred. That is not a good government where the life of the meanest or worst citizen is not protected by the law with the same certainty and care with that of the best and most reliable citizen. The juror is bound by his duty as well as his oath to see that a defendant is not convicted, unless his guilt is fully established by the evidence; and that same duty and the same oath requires that the life of the citizen, be he high or low, great or small, noble or mean, should be held sacred. If jurors by their verdicts should justify parties taking the life of a bad man without trial, because he is a bad man, it would not only be a violation of law and of an oath, but it would be the beginning of a condition of things the most lamentable that any people can fall into.

It is the duty as well as right of every householder in this State to prevent breaches of the peace in his dwelling; and for the accomplishment of such purpose, such householder has the clear legal right to expel from his house any person guilty of an attempt to commit a breach of the peace therein, and may use all the force necessary to such expulsion. But it is not his right or duty to kill or shoot a man to prevent a breach of the peace, or to prevent a simple assault on himself or his wife or on any other person. When the intruder refuses to leave a man's house, the lawful occu-

pant of the house has a right to take hold on the intruder and put or carry him out, and to call to him as much aid of others to assist in putting him out, as may be necessary; but the refusal to depart, or even the commission of a simple assault, does not authorize shooting the intruder. The deceased had no right to enter the defendant's house, and there beat the deceased's wife; but if he did so, that would not justify Conally in attempting to kill the deceased, unless killing the deceased was then necessary, to prevent the commission of a felony. If Mrs. Hill, the wife of deceased, having reasonable ground to apprehend personal violence at the hands of her husband, sought a temporary refuge in the defendant's house, and the deceased, being forbidden, sought to enter, then either the defendant or his wife had a right to use all necessary force to prevent him from entering. But that gave the defendant no right to use unnecessary force, nor to pursue him after he ceased the attempt to enter, and if the defendant unnecessarily followed Hill, the deceased, and shot him after he had ceased to attempt to enter, the attempt which the deceased made to enter the house, forms no justification of the shooting.

If, after being induced by force or artifice, to leave the house of Mr. Conally, the deceased went away, and procured a pistol, armed himself with the same, and then returned to the house with the intention or apparent design, of effecting an entrance by force, or by intimidating the defendant or his family; in that case, the defendant had a right to repel force by force, even to the extent of taking the life of the deceased; if such force and such taking of life was actually necessary, in order to prevent the deceased from committing a felony, or if the defendant had reasonable cause to apprehend that that was necessary, in order to prevent the deceased from doing great bodily harm to him, or to a member of his family. The jury have a right to consider whatever has been proved in regard to the character of the deceased for violence, and to consider the acts of the deceased, and any threats made by him prior to the killing, as well as the conduct of the deceased at the time the shooting occurred.

Although deceased may not really have intended to shoot Mrs. Conally, yet if his known character, and his acts and conduct at the time, were such as were calculated to excite, in the mind of a reasonable man, and did excite in the mind of the defendant, a reasonable ground of apprehension of such intent, and the belief, that the danger was so pressing and imminent, that the death of his wife could only be avoided by shooting the deceased, the act was justifiable or excusable. This question is to be determined by the jury, by the preponderance of the evidence. Yet if the jury, upon consideration of the whole of the evidence, entertain a reasonable doubt as to whether the shooting the deceased was unlawful, they must give the prisoner the benefit of the doubt, and acquit him.

If the defendant, by his own fault, sought the quarrel, and by his own unlawful acts, produced the necessity above mentioned, he cannot be justified or excused by it.

The right of self-defense, or defense of one's family, or his habitation, does not justify pursuing and killing the intruder or aggressor after he has retreated, and after the necessity has ceased. It is only necessary killing that can be justified by the rules of law, of which I have spoken. If the defendant and his wife were acting in concert, and were mutually following deceased up while he was retreating, and after it had ceased to be necessary for the purpose of preventing Hill, the deceased, from committing a felony, the law of self-defense, or of defense of family, or of habitation, is not applicable. If the defendant unnecessarily pursued the deceased, and sought an opportunity to shoot, and did shoot Hill, the deceased, after all necessity and all immediate danger had ceased, for the purpose of gratifying wrongful feelings, the offense is murder.

There must be some other evidence of malice than the mere proof of the killing, to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony, and deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily upon the occasion.

If the jury believe, from the evidence in this case, that there was reasonable ground for the defendant to believe his life in danger, or that he was in danger of great bodily harm from the deceased, and that such danger was imminent, and he so believed, and acting on such belief, killed the deceased, he was excusable.

If the jury believe, from the evidence in this case, that there was reasonable ground for the defendant to believe his wife in danger of great bodily harm from the deceased; that such danger was imminent, and that the killing was necessary, and he did so believe, and acting on such belief killed the deceased, he was excusable.

"A man may repel force by force in defense of his person, habitation or property, against one who manifestly intends by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger. And if in a conflict between them he happens to kill, such killing is justifiable."

But if he pursue him one step after he finds that he is out of danger, and then kills him for the purpose of gratifying his malice or his passion, it is either murder or manslaughter.

The jury found the defendant guilty of manslaughter, and he was sentenced to the penitentiary for a term of two years.

CIRCUIT COURT FOR CLACKAMAS COUNTY, MARCH TERM, 1869.

JOSEPH HEDGES AND J. K. BINGHAM v. JOSEPH PAQUETT, PETER PAQUETT, JACOB S. HUNSACKER AND THE CANEMAH LUMBERING COMPANY.

JURY IN AN EQUITY SUIT.—Stockholders of a corporation sued the directors and the corporation, charging fraud and mismanagement; a jury was empannelled to pass upon the question whether there had been gross mismanagement on the part of the directors, and on the question whether the directors had been guilty of actual fraud.

CORPORATION.—EQUITY JURISDICTION.—A court will not interfere to review or correct the proceedings of the directors of a corporation, on the

ground of fraud or mismanagement, unless there is cause for a displacement of the officers, or for a final winding up of the affairs of the corporation.

INTEREST OF DIRECTOR.—The statute contemplates that directors will sometimes act on matters where the director has an interest.

IDEM.—The rule that prohibits one from being judge in his own cause, applies so far to directors, that the decision of the interested director is not conclusive, but it is subject to be set aside if it is not equal and just, and free from any taint of fraud or partiality.

DIRECTORS, VOIDABLE ACTS OF.—Acts of a board of directors, even if voidable, on the ground of interest of members in the question, are not for that cause absolutely void. And whoever seeks to avoid them, at his own instance and suit, must show that he is injured in consequence of the act complained of.

THE plaintiffs bring this suit against Joseph Paquett, Peter Paquett, Jacob S. Hunsacker and The Canemah Lumbering Company, alleging that that company is a corporation, whose board of directors consists of three members, and that the purpose of the corporation is the manufacture and sale of lumber; that these plaintiffs and the individuals named as defendants, are stockholders owning all the stock of the corporation.

That the defendant, Hunsacker, refuses to appear as plaintiff, and is for that reason made defendant.

That the stock of said corporation consists of ten shares, of the nominal value of \$500 each, of which the plaintiff, Hedges, owns two; the plaintiff, Bingham, one; the defendant, Hunsacker, one; and the said Joseph and Peter Paquett, each three shares.

That in December, 1866, the said Joseph and Peter, confederating together, and with others, to wrong and defraud the plaintiffs, obtained a majority of the stock of the corporation, and elected themselves directors thereof, and appointed the said Joseph, president, and the said Peter, secretary of the corporation; and that they have continued themselves in said offices from that time to the present, and as such officers, have from that time continued to exercise exclusive control of all the affairs of the corporation. That, although required by the by-laws to keep and render full accounts, they have not done so. That they have audited large bills in their own favor, and paid each other large

sums of money for personal services. And that they, by gross negligence and inattention to the duties of their trusts, and with intention to defraud these plaintiffs, have totally destroyed the business of the corporation, and have wasted the funds and property of the corporation, and involved the corporation in debt to a great amount, and reduced the value of the capital stock from par to a condition nearly worthless, and prevented the making of any net profits during all that time. And the plaintiffs aver that, if the affairs of said corporation had been properly managed during that time, the net profits would have been at the least \$3,000, the capital stock would have been of par value in coin; and that the defendants threaten to continue to hold the exclusive control of the affairs of the corporation, and to divert the proceeds thereof from the plaintiffs and to their own advantage.

The answer denies all the allegations of mismanagement and of improper proceedings, and claims that the affairs of the corporation have been well and properly conducted.

At the October term, 1868, the court, on its own motion, directed that certain issues be submitted to a jury, and the following questions were accordingly submitted:

1st. Have the defendants, Peter Paquett and Joseph Paquett, as directors or managing agents of the Canemah Lumbering Company, been grossly negligent of their duties as such directors or agents?

2d. Have they grossly mismanaged the business of said company between December 1, 1866, and March 6, 1868?

3d. Have they within the same time been guilty of actual fraud against said company or against the plaintiffs, as stockholders?

The jury having heard the testimony, the cause was argued and submitted, but the jury failed to agree, and were discharged without a verdict.

By consent of parties, the cause was submitted to the court for final determination, upon the same testimony, together with the depositions of two accountants, who, at the request of the respective parties, had examined the books of the corporation, and were examined as experts.

S. Huelat, for the plaintiffs.

Johnson & McCown, for the defendants.

UPTON, J. filed the following opinion:

The evidence in this case fails to show that the defendants have been guilty of actual fraud.

It is shown that the business of the corporation under their management, has been unprofitable, and their management has not been such as to commend itself either for energy or business capacity; but the evidence does not show either gross negligence or gross mismanagement of the affairs of the corporation. It cannot be considered the province of a court to superintend the current business of corporations, with a view to measure the degree of industry, skill and shrewdness to be required of, or exercised by the directors and other officers or agents. As a consequence, a court of equity will not interfere to review or correct their proceedings, on the ground of fraud or mismanagement, unless there is cause for an absolute displacement of the officer or officers complained of, or for a final winding up of the affairs of the corporation.

The evidence shows that the defendants, Joseph and Peter Paquett, attempted to mortgage the property of the corporation, and it tends to show that the attempt was for the purpose of gaining to themselves an advantage over other creditors, and to reimburse themselves for advances they claim to have made.

It may be assumed as true, that the attempt to mortgage the property of the corporation was without authority, and that the mortgage is void. But it does not follow that the other acts of the directors, having no necessary connection with that attempt, are invalid; nor that the directors have been guilty of any actual fraud. The mortgages, if void, are so because the directors went beyond their powers and jurisdiction in attempting to execute them, and if void, they are of no force, and injure no one.

The most important question presented, relates to the exercise of the powers of the board, consisting of three

directors, by a bare majority—when acting upon matters in which one or the other of the two directors composing the majority had a direct personal interest. By the act concerning corporations, section 9, all the powers of the corporation are exercised by the board of directors, and by sec. 11, the powers vested in the directors may be exercised by a majority of them. These include the election of president and secretary, and probably the fixing their salaries, and the compensation of all other officers, agents and employees, if not determined by the by-laws. The provisions of the statute necessarily involve the idea, that the directors will vote for each other, in filling other offices; for the president must be one of their number.

It seems to be a recognized doctrine in the various states of the union, that “the relation existing between a director and the corporation is that of trustee,” and it has been held as a consequence that a director can not, as such, exercise a discretion in a matter involving his own individual interest. And this has been put upon the ground that “the office of common agent infers a natural disability which *ex vi termini* imports the highest legal disability, because a law which flows from nature is paramount to all positive law.”

On the authority of cases cited in *Gardner v. Ogden* (8 Smith, 327), it is sought to apply to this case the maxim, “*Nemo debet esse iudex en propria causa!*” If the maxim is to be applied to these cases, on the ground that to do otherwise would violate a principle that is paramount to all positive law, it will render proceedings, in corporations having only three directors, exceedingly difficult, and when the directors are more numerous, it will be difficult to draw the line that separates the direct from the indirect interests of the director or even the stockholder.

When a stockholder votes for a particular set of men as directors, he has, or thinks he has, an individual interest in electing those in preference to others; but it is not necessarily a direct pecuniary interest. When, however, one of these directors votes in electing a paid president, the director knows, that if he votes for himself, he votes in favor of his own personal interest, and if against himself,

by voting for and assisting to elect another, he votes in a matter not only involving his own interest, but absolutely decisive of his right to the emolument of the office. I am irresistibly led to the conclusion that the law of this state contemplates that directors will sometimes act and exercise the powers of the corporation, in matters, where the interests of the individual director are not in all respects coincident with those of the corporation, and that the rule in regard to transactions by trustees should apply only so far that the decision of the interested director should not be conclusive, but subject to be reviewed and set aside, if it is not equal and just and free from any taint of fraud or partiality. In other words, the decisions and proceedings of such interested directors are always open to examination, and it is always incumbent on them to show that the utmost good faith has characterized their actions.

If it should be established as a rule, that every vote of a stockholder, and every vote and act of a director, given or done in a matter in which he had a personal interest not coincident with that of the corporation, should be held fraudulent and void, it would be impossible for corporations under our law to transact business, and the act concerning corporations would become impracticable.

If a strict and correct administration of the law required such a rule, the resulting inconvenience would be no excuse for disregarding the law. But is such a rule made necessary by the law of the case? I think it is not.

It is a familiar principle in equity jurisprudence that he who complains and asks relief, in addition to showing that a strict rule of law has been violated, must also show that he is injured by the violation. If he shows that a salary has been audited and paid in a manner not in strict compliance with the law, to invoke equitable relief, he must also show that no salary was due, or that too much was paid, or that in some other respect it caused injury to the complainant.

The language of the statute evidently imports that, if not prevented by the by-laws, the directors may fix their own compensation, and may pass upon other questions in which the individual director has an interest.

If the rule stated in the very impressive speech of Lord Thurlow, cited in *Gardner v. Ogden*, is to be deemed applicable to this subject, such provisions of the general law relating to corporations are not only unconstitutional, but they are in violation of "a law which flows from nature, and which is paramount to all positive law."

Lord Thurlow undoubtedly alludes to some such undefined or supposed doctrine as that which is so often and so flip-pantly mentioned in later years, under the name "The Higher Law."

It is not clear that this doctrine, so positive in its avowed effects and yet so undefined, so often mentioned and yet so little known, has any application to the matter under consideration. If there is such a rule, which renders it impossible to enact a law that permits a director to vote upon a question in which his personal interests may be involved, because such an act would be contrary to a rule that flows from nature, by the same reasoning the congress of the United States would be prohibited from fixing by law the compensation of its members. A governor would not be capable of signing an appropriation bill appropriating money for the payment of his salary. And no constitution could confer the power, for the rule, as Lord Thurlow declares, is paramount to all positive law.

When a particular application of the language of that learned jurist will lead to a conclusion so manifestly erroneous, there must be some error in the application.

I think the directors of a corporation may, under our law, by their votes select the president and other officers and agents of the corporation, and if not prevented by by-laws, may audit, and allow their own compensation. The right of election by votes of the directors, necessarily includes the volition in each director to vote for or against each candidate in cases where he has a voice. Whether it includes a right on the part of a director to vote for himself for an office which must or may be held by one of the directors, I will not attempt to decide, as the point in question may be placed on the less questionable ground, that such acts of the board of directors, even if voidable, are not absolutely void.

And whoever seeks to avoid them, at his own instance and suit, must show that he is injured in consequence of the act complained of.

I do not think the plaintiffs have shown direct injury growing out of the manner of selecting officers or agents, or out of the manner of auditing or allowing accounts. Nor have they shown any actual fraud, or any such gross mismanagement of the affairs of the corporation as warrants the interference of a court of equity.

An order should be entered dismissing the bill.

CIRCUIT COURT OF MULTNOMAH COUNTY, JUNE TERM, 1869.

WILLIAM OLIVER v. THE NORTH PACIFIC TRANSPORTATION COMPANY.

CORPORATION LIABLE FOR NEGLIGENCE OF AGENT.—A corporation is liable to the injured party for damages caused by the agent of the corporation in carelessly firing a signal gun from the corporation's ship, although the agent acted contrary to instructions as to the manner of firing.

PRINCIPAL LIABLE, WHEN.—If an agent abandon his principal's business and do something not pertaining thereto, the agent or actor is alone liable. But if he do his principal's business in a careless manner which he was directed to do in a careful manner, the departure from orders will not exonerate the principal.

MEASURE OF DAMAGES.—In estimating damages for injury to the person carelessly shot and hit by the wad of a cannon, it is proper to consider loss of time, money necessarily expended, or debts necessarily incurred in curing the bodily injury, and whatever bodily pain the injury may have caused the injured party.

IDEM.—The object of the law in such a case is compensation.

EXEMPLARY DAMAGES.—Exemplary damages denied.

THE complainant charges, that the defendant, a corporation engaged in navigating the waters of the State of Oregon, and plying between Portland, Oregon, and Victoria, a foreign port, was owner and had control of a steam-vessel called "The Gussie Telfair." That at the departure of said vessel from Portland, the plaintiff was on the wharf, and the defendant's servants in the conduct and management of

the vessel, fired a loaded cannon from on board the vessel as a signal of departure, in such a careless and unskillful manner, that "the plaintiff was hit and struck upon his face and head by the wadding and other material," fired from the gun, and was greatly injured and wounded. Loss of time, expense, suffering and permanent personal injury are alleged, and damages laid at \$25,000.

The answer denies that defendant then had control of the vessel, and avers that it was under the control of a pilot. Denies that the gun was fired "by defendant's agents as such agents." Denies want of care and skill. States that if the gun was fired as charged, "it was done without authority or direction of defendant," and not by persons in the discharge of their duty as agents; and done directly in violation of the directions and instructions of defendant. That the alleged injury was not the fault of defendant. Denies that plaintiff was greatly injured, or detained from his business more than one week, or has suffered any damage.

The replication denies the allegations of the answer.

David Logan, for the plaintiff.

Lansiny Stout, for the defendant.

The facts proved on the trial were substantially as alleged in the complaint. The gun was fired while the ship was turning in the river. It was the duty of the persons in charge of the gun to fire it while the vessel was headed across the stream, so that the wadding would have been discharged down the channel of the river, but by negligence or mismanagement, the firing was delayed until the bow of the vessel was so far turned down the stream that the direction of the gun was toward the wharf, which the vessel had just left, and upon which the defendant and numbers of others were still standing. Plaintiff's injuries were severe abrasions about the face, rendering his condition critical for a few days; and there was some evidence tending to show that he is to some extent permanently injured.

The defendant offered to prove that the vessel was in

charge of a pilot appointed, in pursuance of the law of this state; claiming that under a law, compelling commanders and owners to receive a pilot on board, and to pay him for taking charge of the vessel while in the river, the owners cannot be held responsible for negligence of subordinate officers.

The plaintiff objected for irrelevancy, and the objection was sustained.

There was some evidence tending to show that the gun did not point in the direction of the wharf, but that the wadding divided, and a piece of it only, being deflected, struck the defendant.

The following instructions, asked by the defendant, the court refused to give.

"If you believe, from the evidence, that the firing of the gun was in violation of the orders of the company, as given to the master of the ship, the defendant is not liable."

"If the person who fired, or directed the gun to be fired, acted in violation of the instructions of defendant, then they, and not the defendant, are liable."

"If the man fired the gun in response to orders from a superior in defendant's employ, and that superior violated his instructions from defendant, in so ordering the gun to be fired, the defendant is not liable."

"This being an action for the wrongful acts of agents of defendant, unless you believe from the evidence, that the defendant directed the assault to be made on plaintiff, you cannot, in estimating the damages, consider anything but plaintiff's loss of time, and actual expenses attending the injury."

The following instructions, asked by the defendant, were given to the jury:

"In this case, the defendant is not liable for anything beyond the actual damage sustained by the plaintiff."

"Actual damages are the measure of the liability of the defendant."

The plaintiff requested instructions, that it was within the province of the jury to find exemplary damages, which were not given.

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UPTON, J., also gave the following instructions:

In cases of this kind, the jury are to determine all questions of fact, and all questions of fact are to be determined according to the weight of evidence.

It will be a question of fact for you to determine whether the gun was fired by the plaintiff's agent, while acting in the course of the plaintiff's business, as his agent. If an agent doing business for a company, do the business in such a careless or negligent manner, that one who is without fault, is injured by the carelessness or negligence, the company is liable to pay the injured party the damages actually sustained in consequence of the injury. If one who is agent for another, and authorized to transact his business, as, for instance, to sail a ship upon a particular voyage, depart from the business he is directed to transact, and without authority, divert the ship from his principal's business, the principal may be exonerated from liability. But the fact that the agent does the principal's business in a careless manner, which he was directed to do in a careful manner, will not exonerate the principal.

The burden of proof is on the plaintiff, to show that the person who fired the gun, or gave the order, was acting at the time as the agent of the company, that the act was negligently or carelessly done, and that the plaintiff was injured by the carelessness or negligence.

If the evidence satisfies you that the plaintiff is entitled to recover, it will be for you to determine from the evidence what amount of damages plaintiff has sustained.

Under the pleadings, the measure of damages is the loss and injury actually sustained by reason of the negligence. The defendant is not liable for anything beyond the actual loss and injury sustained by the plaintiff. And the plaintiff, if entitled to anything, is entitled to such a sum of money as will fully compensate him for all loss and injury to him, caused by the negligence or wrongful act.

In estimating damages, it is proper to consider loss of time, money necessarily paid or debts necessarily incurred in curing the bodily injury, and whatever bodily pain it may have caused to the plaintiff.

The object and intent of the law in this class of cases, is to establish such a measure of damages as will fully compensate the injured party for all the injury he has sustained, whether the injury be loss of time, loss of money, bodily pain, or permanent bodily injury. But this is not a case where there is occasion to give what is called exemplary damages.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1869.

BENJAMIN STARK v. CYRUS OLNEY.

COVENANT OF WARRANTY.—OUSTER.—NOTICE.—In an action for damages for the breach of a covenant of general warranty, the grantee was ousted in an action of which the warrantor had no notice: *Held*, that it devolved on the plaintiff to prove that he was ousted by paramount title.

COVENANT.—DAMAGES.—Where a deed contained two covenants and both were broken: *Held*, that the defendant is entitled to recover on that which will give him the largest amount of damages.

MEASURE OF DAMAGES.—In estimating damages upon breach of covenant of warranty, when the title fails as to a part only of premises, interest should be computed upon the relative proportion of the purchase price.

RATE OF INTEREST.—Where the rate of interest had been increased by statute, the rate prescribed by the old law was adopted up to the time of the change, and that of the new law during the time subsequent.

COSTS.—The covenantee was not allowed to recover the costs of an action defended by him, subsequent to the eviction.

CONSIDERATION.—The consideration expressed in the deed is *prima facie* evidence of the actual price, but the presumption may be rebutted.

THIS case was tried by the court upon the pleadings and proofs, a jury being waived.

The facts are stated in the opinion filed.

William Strong, for the plaintiff.

Page & Thayer, for the defendant, present the following points:

1. The plaintiff is bound to prove that the title by which his vendee was evicted was paramount to Olney's.

2. The rate of interest is to be determined by the law in force at the time the contract was made.

3. The defendant is not liable for the expenses or fees of the action between the plaintiff and his vendee; nor does the amount recovered in that action constitute a basis for the estimate of damages in this case.

UPTON, J. This is an action for damages for breach of covenants of seizin and of warranty, in a conveyance of certain lots from the defendant to the plaintiff. After alleging the eviction of the plaintiff's grantee, from one of the lots, the complaint sets up the proceeding in an action brought by the plaintiff's grantee against the plaintiff, for breach of the plaintiff's covenant, wherein the said grantee recovered a judgment against the plaintiff, for \$1,447.40 damages and \$85.15 costs, and paid an attorney's fee of \$75. *The answer* puts in issue the allegations in regard to the amount of damages recoverable in this action; averring, among other things, that the lot in question in this action was sold by the defendant to the plaintiff for \$200 and that at the date of the deed it was worth \$200, and no more.

The defendant, Olney, conveyed to the plaintiff, Stark, February 8, 1854, four city lots, covenanting that he was well seized, had a right to convey, and also covenanting to warrant and defend Stark and his assigns in the possession. The deed recited that \$2,000 was the consideration. Stark's grantee was evicted, by final process, December, 2, 1863.

Stark's grantee recovered from Stark, in an action upon Stark's warranty, \$1,447.40 damages, and \$85.15 costs. The defendant, Olney, had notice of this last action, but had no notice of the action of ejectment. I think it may be conceded that it devolved on the plaintiff to prove on the trial that the eviction was by paramount title. (*Beddoe v. Wadsworth*, 21 Wend. 120; *Kelley v. Dutch Church of Schenectady*, 2 Hill, 105.) But I find from the evidence of the defendant that such was the case.

The plaintiff, although not pleading each breach separately, states facts showing a breach of the covenant of seizin, and also a breach of the covenant of warranty. The

former covenant was broken as soon as the covenant was made; that is, February 8, 1854, and a cause of action then accrued to recover the damages, the measure of which would be the purchase money with legal interest (then six per cent.) from that time.

The covenant of warranty was broken at the time of the eviction; that is, December 2, 1863, and that cause of action did not accrue until that time, but in either case the measure of damages is the purchase money and interest from the date of the deed.

The statute of limitation has not been plead, and it would seem that the plaintiff has a right to recover upon the cause of action, which will give him the largest damages, if there is a difference in that respect.

In estimating damages, I think interest should be computed upon the relative proportion of the purchase price, at the rates prescribed by law; namely, at six per cent., from February 8, 1854, up to May 1, 1854, at which time the rate was changed by statute, and from that time at ten per cent., on the principal sum.

The plaintiff claims to recover costs and attorneys fees incurred in the action between the plaintiff and his grantee, instituted by his grantee after eviction. This claim is clearly distinguishable from a claim for expenses incurred in defending against eviction. In the latter case a defense is necessary, either to protect and defend the title, if it be good, or to make record evidence of the fact, if it is bad, and if the covenantor is notified to appear and defend, it seems just and in accordance with precedent, that in case of failure of title, he should be at the expense of the defense.

In the present case, after the invalidity of the title had been established, the plaintiff permitted himself to be sued for money which it was his duty to pay, and which he must pay before he could recover in this action.

It does not appear by the complaint in this case that any defense, in which the present defendant had an interest, was or could have been set up.

The plaintiff may have been compelled to pay a greater

amount than he is entitled to recover here, because of the greater value of the land at the time he covenanted; but to allow him to recover the additional amount in this action, would be a departure from the well settled rule that the amount of damages is the purchase money and interest. (*Staats v. Ten Eyck*, 3 Cains, 112, and note.)

The amount expressed in the deed is *prima facie* evidence of the value as determined by the consideration, but it is subject to be rebutted by parol.

The actual price fixed by the parties is to be taken as the value (*ib.*).

The complaint states that the four lots were conveyed "for the consideration of \$2,000," and "that the value of said lot one, counting the four lots at \$2,000, was \$600." The answer says in regard to this, merely: "The consideration for which he conveyed said lot one, was not six hundred dollars, as the plaintiff has alleged, but was two hundred dollars, and no more."

How far it is necessary for a defendant to deny matters of evidence, or conclusions or inferences appearing in the complaint, I will not here say, further than this: The material allegation upon which the plaintiff relies is, that the value of the land was \$600. This being met by a direct denial, I think the pleadings authorized the defendant to prove the real consideration. This was shown by the defendant's testimony to be \$200 for the lot in question.

The judgment should be for the plaintiff in the sum of \$507.73 and costs.

CIRCUIT COURT FOR MULTNOMAH COUNTY, MARCH TERM, 1869.

OREGON CENTRAL R. R. CO. v. AARON E. WAIT.

In an action to condemn land to the use of a railway company, the defendant denied that the plaintiff was a corporation, and also presented issues, as to the value of the land, and the amount of resulting damages; *Held*, that these issues could not be tried together. The defendant de-

3	91
3	428

3	91
26	108
34	1027

clined to elect, and the denial of the plaintiff's corporate capacity, was struck out on motion of the plaintiff.

NEITHER a railway company, nor the owner of land adjacent to the railway, is required by law to fence the line between them. Each is left by the law to fence or not, as the interest of each shall prompt it or him.

THE defendant is entitled to the actual value of the land appropriated; and, if injury, resulting from constructing the road, will exceed the resulting benefits, the excess of such injury is to be added to the value of the land appropriated.

A DENIAL of the plaintiff's corporate existence, may, in some instances, be a plea in bar; but when establishing the truth of the plea, will not authorize a judgment that will bar a future action, but will abate the present action, the plea is in abatement.

THIS was an action by a railway corporation, to obtain a right of way, for the plaintiff's railroad through a parcel of about three hundred and twenty acres of the defendant's land. The answer denies knowledge or information, sufficient to form a belief whether the plaintiff is a corporation; denies that the parcel sought to be appropriated contains no more than seven and a half acres, and alleges that it contains ten acres; and it avers that the construction of the proposed road, will injure and damage the residue of the defendant's said parcel, \$1,200.

The replication denies that the parcel sought to be appropriated, is greater than alleged in the complaint; denies that the damages resulting to the defendant, will be \$12.00, or more than \$50.

The plaintiff moved that the defendant elect between the defense, that the plaintiff is not a corporation, and the residue of the answer. It was ruled that the defendant may elect, whether he will first go to trial on the issue first mentioned, or abandon that defense, and have his damages assessed. The defendant declined to elect, and claimed the right to try all the issues together.

The plaintiff moved that that part of the answer, denying that the plaintiff is a corporation, be struck out, and the motion was granted.

The cause being tried by jury, at the defendant's request the jury viewed the premises, and the evidence and argument having been heard, the cause was submitted.

The following instructions, requested by the plaintiff, the court declined to give:

"There is no law requiring the defendant to construct or maintain fences along the line of the railroad, and the plaintiff would have no assurance that the defendant would make or maintain a fence, even if he were to be paid for the same by your verdict.

"If the plaintiff needs a fence for its own protection, or should be compelled by law to fence, it would be compelled to fence at its own expense.

"The plaintiff is liable, at any session of the State legislature, to be required to fence its road, and in that case the plaintiff would be obliged to fence at its own expense."

At the request of the plaintiff the court gave the following:

"If the benefits to the land resulting from the proposed road are equal to the resulting damages to the land of the defendant, all that is to be assessed is the value of the land sought to be condemned.

"There is no law requiring the defendant to construct or maintain a fence or fences along the line of the railroad."

The court added to this instruction the following:

"Nor does the law require either party to do so. The railroad company and the defendant are each left, by the law, to fence or not to fence, as the interest of each shall prompt it or him."

The defendant asked the following instructions, which the court declined to give:

"The plaintiff is not required by law to fence the lines of the land sought to be appropriated, nor to construct cattle guards, or crossings, for crossing from one part to the other of the land of the defendant."

At the defendant's request the following instruction was given:

"The plaintiff is not entitled to take any of the defendant's land for the purpose of a railroad without compensation being first made or secured, and building a railroad in the future can not be considered any part of such consideration."

And the court added the following:

"But advantages resulting from the construction of a railroad may be considered as a set-off to, or a compensation for resulting injuries to the land not appropriated or taken by the plaintiff."

At the defendant's request the court gave the following:

"The verdict of the jury in this action should secure to the defendant compensation for all the damages resulting from the appropriation of the land sought to be appropriated, irrespective of any increased value thereof by reason of the proposed improvement."

And the court thereupon added:

"The defendant is entitled to the full value of the land actually taken, no matter how great advantages he may derive from the construction of the road. Such advantage can not be set off against the value of the land. But if you find that there is resulting injury or damage to those lands of the defendant which are not sought to be appropriated by the plaintiff, such resulting injury or damage may be compensated by resulting advantages caused to the same land by the construction, if such resulting advantages are sufficient in amount.

You will first find the value of the land actually taken or sought to be appropriated. Under any and all circumstances the defendant is entitled to recover what that parcel of land is worth.

The estimate of all other damages, except the actual value of the parcel taken, is based upon reduction in the value of the premises that will be caused by laying out, constructing, maintaining and operating the proposed railroad. If the injury will exceed the resulting benefits, you should add the excess of injury or the depreciation, to the value of the land which is actually taken. If the benefits are equal to, or will exceed, the resulting damages, all that the jury should assess is the value of the parcel of land sought to be appropriated.

The jury rendered a verdict assessing the defendant's damages at \$50.

The defendant moved for a new trial, assigning as error the several rulings above mentioned.

J. N. Dolph and S. Huelat for the plaintiff.

Wait & Kelly, for the defendant.

The motion for a new trial was overruled upon the following grounds:

UPTON, J. This is a proceeding under the statute providing a special mode of obtaining the right of way by a railway corporation. (Code, p. 670.)

The statute provides, that "the defendant in his answer may set forth any legal defense to such appropriation of such lands, or any portion thereof; or, omitting such defense, may aver the true value of the land in question, or the damages resulting from the appropriation thereof, or both. And the act further provides, that "such action shall be commenced and proceeded in to final determination, in the same manner as an action at law, except as in this title otherwise specially provided." The first question presented on the motion for a new trial is, whether a defendant may at the same time set up that the plaintiff is not incorporated; and also the true value of the land in question, together with a claim for the damages resulting for the appropriation thereof?

I do not think the statute above quoted places the matter of joining these defenses in an attitude more favorable to the defendant's position than does the ruling in the case of *Hopwood v. Patterson*, 2 Ogn. 49. I think that clause of the statute which speaks of setting forth "any legal defense," uses the word defense to denote a statement of facts that will debar or preclude the plaintiff from appropriating the land upon any terms. That is, the defendant may plead any matter that will defend him against being compelled to yield the right of way. And I presume the defense thus spoken of may be a statement of facts, in abatement, which, if found true, will defend him against yielding up the right of way in this action; or it may include facts that will perpetually bar the plaintiff from obtaining such right. The statute provides that he may set forth such defense, "or omitting such defense," he may have the damages ascer-

tained. I see nothing in this statute to authorize a joinder of matters that could not be joined under the general practice act.

It is urged that this question, if treated as arising under the general practice act, is not within the rule established in *Hopwood v. Patterson*, because the denial of the plaintiff's corporate existence, is not a plea in abatement. It is true that there are cases where a denial of the plaintiff's corporate capacity brings the cause to trial on the merits of the case, and the defense may then properly be said to be in bar of the action. But this is not usually the case, and when establishing the truth of the matters alleged, will not bar a future action for the same property, but will abate the present action; it can not be said the matter answered is a plea in bar. If a party seeks to set up such a defense, he should do so before answering to the merits. (*Conard v. The Atlantic Ins. Co.*; 1 Pet. 450.) If issue were joined, and a trial had on that question in this case, and it should be shown that the persons who are engaged in the construction of this road, for some technical defect, or for any reason were not incorporated, but were merely partners, the action would abate; but if they saw fit to incorporate immediately, and to commence another action for the same right of way, the judgment in this case would be no bar to such action. Hence this part of the answer can not be properly called a plea in bar, and there was no error in striking it out, under the rule established in *Hopwood v. Patterson*.

The next and probably the most important question presented in the case, refers to the assessment of damages. The question calls for a construction of sec. 18, art. 1 of the constitution, and sec. 24 of the general incorporation law. (Code p. 665.) The statute discloses that "no such appropriation of private property shall be made, until compensation therefor be made to the owner thereof, irrespective of any increased value thereof, by reason of the proposed improvement by such corporation, in the manner hereinafter provided." This language is sufficiently indefinite, that one party to this proceeding, construes it to be a restriction on

the corporation, to prevent the corporation from avoiding any liability or lessen the amount to be paid, because of enhancing the value of the defendant's property; and the other party construes it to be a restriction on owners of land, to prevent them from obtaining an extra price or value for land, by reason of increased value, caused by the acts of the corporation in constructing the road.

The position taken by the defendant is that the payment to be made, both for the land actually taken, and for the resulting damages, must include the whole value of the land, irrespective of any increase, etc., and full payment of all damages that may result, irrespective of any advantage or benefit. benefit. And I am aware that it has been held in an other state, in one case at least, that, independent of any statute, this is equitable and right. That if a railway project actually raises the price of the lands generally in a neighborhood, the individual, through whose lands the road happens to run, is as well entitled to reap the benefit as are his neighbors, through whose lands it does not run. And if building the road causes him some inconvenience and disadvantage in some respects, and affords him conveniences and advantages in other particulars, it is no more just to set off one against the other, than it would be to compel his neighbors to pay or to contribute to the corporation in proportion to the amount their property is enhanced in value.

It is true, that as between himself and his neighbors, whose lands the road does not touch, he may be less benefited than they; but if constructing a road will injure him in one particular, but will benefit him in some other particular to an extent greater than his injury, I am unable to see the moral wrong, as between him and the builders of the road, in refusing to compel them to pay him for acts which do him more good than injury; aside from paying for land actually taken. The fundamental law protects him as to the land the corporation actually seeks to take from him, and he cannot be deprived of that without full compensation, even though the benefits may exceed the injury by a thousand fold, because such is the law. And in this state, the branch of the case denominated resulting damages, de-

pendes for its solution upon construction of statute, and cannot be determined by abstract reasoning on the subject of man's natural rights.

If it was the claim of a neighbor for damages, whose lands lay so near the track as to suffer similar inconveniences without actually being touched by the railway, the statute would not apply. But one who is compelled to part with some part of his tract of land has, by virtue of the same statute which compels him to part with it, a standing in court, to ask, not only for compensation for that which is taken, but for resulting damages beyond that.

If the statute had said he should have full payment for the land taken, "irrespective of any increased value thereof," and full compensation for all damages done to any land not taken, irrespective of any increased value *of that which is not taken*, it would come up to what is now claimed as the construction of the present statute.

But the statute falls short of that; the increased value that is not to be considered is, "the increased value thereof;" the word "thereof" evidently refers here to the land to be appropriated, and not to the residue. I am convinced that, if beyond the loss of the land taken, the defendant is not on the whole injured, but is in fact benefited, he cannot under this statute recover resulting damages for a proposed road, the construction of which will as a whole be an actual benefit to him over and above all damages. I think the jury were correctly instructed on the subject of fencing the line of the road, and that no error has been committed, to the prejudice of the defendant.

The motion for a new trial must be overruled.*

* After the overruling the motion for a new trial, costs were erroneously taxed in favor of the plaintiff, and the taxing of costs was reversed on appeal to the supreme court. The ruling of the circuit court was affirmed on the several points involved in this motion. See *Post*, *Ogn. Central R. R. Co. v. Wait*.

CIRCUIT COURT OF CLACKAMAS COUNTY, OCTOBER TERM, 1869.

**WILLAMET FALLS CANAL AND LOCK CO. v. JAMES
K. KELLY AND THE PEOPLE'S TRANSPORTATION
COMPANY.**

MEASURE OF VALUE.—It is not competent to show what a parcel of land brought at a sheriff's sale for the purpose of proving its value.

ACTION BY A CORPORATION FOR RIGHT OF WAY.—In an action by a corporation to condemn land for a canal, the plaintiff cannot disparage the defendant's title.

PARTIES.—It being the duty of the plaintiff to bring all owners into court, if he does not, he cannot avail himself of the neglect to reduce the amount of damages.

COMPENSATION.—The defendants are entitled, in any event, to the actual value of the parcel sought to be condemned to the plaintiff's use. But whether the defendants recover in addition to that, depends upon whether the injury done to the residue will be greater than the benefits.

WATER POWER.—If the appropriation will carry with it water power, or render such power less valuable, such water power should be considered by the jury in making the estimate.

THIS was an action by a corporation to have certain lands of the defendants, and a right of way upon the same, appropriated to the plaintiff's use, under the general incorporation law, for the construction of plaintiff's proposed canal.

The complaint set out the time, place, manner, object and purposes of plaintiff's incorporation; particularly designated the parcel of land sought to be condemned and appropriated; asserts the necessity of the appropriation, and that each of defendants is owner of an undivided half of the land in question. This parcel of land is sixty feet wide and one thousand feet, more or less, in length, and extends from a designated point below, to a point above the Willamet falls, along the western margin of the Willamet River.

The answer avers the true value of the land, and that the defendants are owners of other lands of which this forms a part (describing the whole tract), and that the damage to the residue of the tract that would result to them from such appropriation would amount to \$50,000.

The replication denied that the value of the land was

more than \$——, and denied that any damages would result from the appropriation of the premises.

S. Huelat, for the plaintiff.

Mitchell, Dolph & Smith, for the defendant, The Peo. T. Co. (a)

A jury being empaneled, and it being held that the affirmative of the issue, was with the defendant, after the case was opened the defendant proceeded with his evidence; after which, the plaintiff's witnesses were examined, and defendant called witnesses in rebuttal.

The following are the points ruled in the course of the trial:

The defendant asked his own witness, the following question: "What is the value of the land sought to be appropriated, including whatever water privilege would be appurtenant to that part of the land when it is segregated?"

The plaintiff objected; that the plaintiff is not authorized to use water, except for a canal, and could not use all the water that may be deemed appurtenant. That the question calls upon the witness for an opinion, as to what water would be appurtenant. That the inquiry here should be, what will the defendant be damaged, and how much will the plaintiff gain.

The objection was sustained.

Defendant's witness having testified that the whole tract was worth \$50,000, was asked on cross-examination, if he knew of its having been sold at sheriff's sale, and, if yes, what was it sold for? Defendant objected for incompetency.

By the court.—Usually a cross-examiner may ask any question pertinent to the issue, tending to explain or contradict what the witness has testified, and sometimes may ask questions for the purpose of contradiction, that are not

(a) The defendant, J. B. Kelly, being a stockholder in, and an officer of the plaintiff, declined to take a part personally in the trial of the cause. It is probable there was no disagreement between him and the plaintiff as to the amount of compensation. But his relation to the plaintiff did not appear by the record made in this case.

otherwise relevant. But it is not obvious here, that the answer will either explain or contradict the witness' statements should a sale for ever so small a sum be proved, because a sheriff's sale may have been a sale of the interest of some one who had a doubtful, or only a colorable title, or there may have been an irregular sale, or a sale without authority; in that case, it would not tend to contradict the witness. If the evidence is allowed to go to the jury, it will be necessary to permit the defendant to go into an investigation of all the circumstances attending the sale; an investigation, that might be as difficult as the issue now before the jury. The objection should be sustained.

The plaintiff asked his own witness: "Do you know whether this land has been sold at public auction, and if so, for how much?" The question was objected to, as irrelevant and incompetent. The objection was sustained.

The defendant's witness being asked, on cross-examination, what he paid for the undivided half of the whole tract, and the question being answered without objection, on re-examination, the defendant asked the witness: "For what purpose did you purchase the property?" The question was objected to as immaterial, and not responsive to the cross-examination. The objection was sustained.

The plaintiff offered to prove that certain parts or lots of this ground, sought to be appropriated, belonged to persons not parties to this action, and not to the defendants. And also, that the defendants' title to the tract generally was disputed. *Held*, that the plaintiff must pay the full value of the land sought to be appropriated; that there was no occasion to inquire about the ownership, and that as to resulting damages, the plaintiff having sued these defendants as owners of the parcel, he can not question their title in this proceeding.

UPTON J., instructed the jury as follows:

The defendants have admitted by their pleadings, that the plaintiff is entitled to take the land designated, upon making reasonable compensation to the defendant, and you have been called to determine what is reasonable compensation.

There are two distinct branches, or grounds of estimate, to be considered in arriving at your conclusions. One is the actual value of the strip or parcel of land, sixty feet wide, that the plaintiff proposes to take; and you are also to estimate such other damages, if any there be, as will result to the owners of the residue of the whole tract, in consequence of taking part of it.

Under any view that can be taken of the case, the defendants are entitled to recover the actual value of the parcel that is to be condemned to the plaintiff's use. But whether the defendants recover, in addition to that, damages for injury that will be caused to the residue of their land, depends upon the question whether the injury thus done to the residue of the land will be greater than the benefits that will accrue to such residue, in consequence of the appropriation and use of the land taken.

In regard to damages, over and above the value of the land actually appropriated, the subject for your consideration is the reduction in value of the premises, by reason of the projecting and construction of the canal in the manner the plaintiff may pursue. Will the land and its appurtenances be worth less, and if any less, how much less. You will, therefore, see the necessity of keeping these two branches or grounds of your estimate distinct from each other. The plaintiff proceeds upon the theory that there is a public necessity for the projected canal, and it is upon that theory that the law permits private property to be taken without the owner's consent. Under the constitution and laws, private property cannot be taken even for public use, without compensation, and the land actually taken must be paid for, independently of any advantage that may result to the defendants from the plaintiff's proposed enterprise. But if, in your opinion, the other damages caused to the defendants will not be greater than the benefits to them, resulting from the plaintiff's enterprise, you will not include in your verdict any other damages than the value of the land to be appropriated. Should you think such other damages will be greater than the resulting benefits, you will strike a balance between such resulting damages and benefits, and add

that balance to the actual value of the land that the plaintiff seeks to appropriate, to make up the total of your verdict.

Whatever water power the owner of the land is entitled to because of his ownership of the land, must be treated by the jury as the property of the owner of the land. And if the appropriation asked for will carry with it any water power, or render it less valuable, or interfere with the defendants' use of any water power, to which they would otherwise be entitled, such water power should be taken into consideration by you in making your estimates.

The jury rendered a verdict in favor of the defendants for \$1400. (b)

CIRCUIT COURT FOR WASHINGTON COUNTY, OCTOBER TERM, 1869.

CHARLES S. WHITE *et al.* v. ISAAC ALLEN.

THE DONATION LAW.—DECEASED WIFE.—Where a husband and wife settled upon 640 acres of land in 1844, and the family continued to reside upon and cultivate the land, but the wife died on the twenty-sixth day of September, 1850, no land was granted to the wife by the donation act, and the survivor can take under that act but 320 acres.

PLEADING.—Evidence ought not to be inserted in, or made part of an answer.

MOTION TO STRIKE OUT.—On a motion to strike out part of an answer, if the motion contains but a single specification, and includes some matters that ought not to be struck out, the whole motion must be denied.

EQUITABLE DEFENSE.—It is essential to an equitable defense that the defendant has no legal defense.

BILL OF REVIEW.—A defective decree may be reformed under a prayer for general relief.

PATENT TO A WRONG PARTY, NOT VOID.—Where equity relieves from the effect of issuing a patent to a wrong party, the patent is held to be effective to pass the title from the United States, but the patentee is held to be a trustee for the benefit of the rightful claimant.

SUPPLEMENTARY ANSWER.—Material facts that did not exist at the commencement of the suit may be set up by supplementary answer.

(b) The final adjournment of the term occurred before the money was paid into court and judgment was not rendered until the May term, 1870. It being held that judgment could not be entered until after payment of the damages assessed by the jury.

ERROR MAY BE CURED.—If it is error for a witness to voluntarily state the contents of a written memorandum, the error will not vitiate the residue of his deposition if he at the time produce and exhibit the memorandum.

MEMORANDUM.—The fact that a witness has looked at a memorandum to refresh his recollection before being called, does not render him incompetent.

A PATENT IS PROOF OF REGULARITY OF PROCEEDINGS.—After a patent has issued, the exhibition of the patent proves the regularity of preliminary proceedings.

SUPREME COURT.—If the question whether a woman who died before September 27, 1850, or her representatives, become entitled under the donation act, is still open to discussion, since the ruling in *Ford v. Kennedy*, 1 Oregon, 166, its review should be had in the supreme court.

PRIVITY.—One who has no right to or interest in the land cannot set up the disqualification of a donee. But one who settled on government land, in compliance with the donation act, while it was still government land and before a certificate issued to another, acquired such an interest as rendered him competent to set up the disqualification.

BILL OF REVIEW.—By our code, § 377, whatever subject matter could formerly have been presented by any of the various formal bills in chancery, may now be brought before the court as an "original suit;" and if the subject matter constitutes a defense, it may now be presented by an answer.

W. W. Chapman, for the plaintiff.

Mitchell & Dolph and *W. D. Hare*, for the defendants.

THE complaint in this case is in the statutory form for the possession of a parcel of land in Washington County, known as the north half of the "White Donation Claim."

The answer is voluminous, containing copies of sundries, documents and records. Its material parts are as follows:

It denies plaintiff's ownership of the premises and right of possession, and alleges that one Samuel P. Soule, a white male citizen of the United States, and then a married man and resident in Oregon, and entitled as a donee under the donation law, settled upon the lands in controversy, March 27, 1855, and from that time, with his wife, resided upon and cultivated the said premises for four consecutive years, claiming the same as a donation from the United States. And before November 17, 1860, said Soule and his said wife became owners of said lands by virtue of a full compliance with the donation law; having filed with the register of the land office his notification and proofs.

That on the seventeenth of November, 1860, the defendant purchased from said Soule and wife, for a valuable consideration, one parcel (designated in the answer) of said premises; which parcel said Soule and wife then conveyed to him by their deed; and about that time said Soule and wife, for a valuable consideration, conveyed to defendant the residue of said premises, "by a mortgage duly executed and delivered, and they at that date delivered to the defendant the possession of the whole of said tract of land under said deed and mortgage."

That prior to September 27, 1850, Richard White, one of said plaintiffs, and his then wife, Caroline White, who was the mother of the other plaintiffs aforesaid, claimed a tract of six hundred and forty acres of land that included the premises in controversy. But that said Caroline departed this life on the twenty-sixth of September, 1850. That said Richard White, on the tenth of November, 1859, elected to take, and did take, the south half of said tract, containing three hundred and twenty acres, being the south half of the said parcel known as the "White Donation Claim." And the said Richard White, for himself and the heirs of said Caroline, abandoned the premises in controversy.

That after defendants' said purchase, said Richard White, on the twenty-second of September, 1862, by means of false, fraudulent and *ex-parte* affidavits, procured a donation certificate, for the whole six hundred and forty acres, to be issued to him and to the said Caroline White, and afterwards, and by means aforesaid, procured a patent to be issued, granting the south half of said tract to said Richard, and the said north half to the said heirs of said Caroline White. That this defendant, on the sixteenth of February, 1863, commenced a suit in this court against these plaintiffs, setting up the foregoing facts as cause of suit, and said plaintiffs were duly served with process therein, and such proceedings were therein had; that this court, on the twenty-second day of December, 1863, rendered a decree therein decreeing against these plaintiffs: "That all benefit and advantage of said certificate, or any patent that may be issued in pursuance thereof, be vested in plaintiff (this defendant

meaning), and that said certificate, or any patent that *may* be issued in pursuance thereof, be *adjudged void* and of no effect as to said plaintiff (meaning this defendant), and that said plaintiff (meaning this defendant) be adjudged to be the absolute owner of said land in fee, and that said defendants (these plaintiffs meaning) be adjudged to have no right thereto or therein." The answer prays that plaintiffs be compelled to convey to defendant the premises; that any color of title which plaintiffs may have in the premises, be decreed to be held for the benefit of the defendant, and the answer concludes with the prayer for general relief.

The plaintiff moved to strike out a part of the answer, including copies of affidavits and of divers other papers used and filed in the surveyor-general's office, which were annexed to and declared to be made a part of the answer.

The court held that some of the matters embraced in the motion were statements of fact material to the defense set up, and for that reason overruled the motion; but expressed the opinion that if the motion had pointed to the copies alone, the motion should be granted, and that setting forth in the pleadings such copies, or any other matter that is merely evidence, is an inconvenient and troublesome practice not authorized by the Code.

The plaintiff demurred to all that part of the answer that precedes the allegations in regard to a former suit, that it "does not constitute a defense in equity;" and to so much as relates to the former suit, "that it does not constitute a suit or defense in equity, and if pleadable at all is pleadable in law;" and that the facts there set forth are the same facts stated in the first mentioned part of the answer.

By the Court, UPTON, J. If the decree that the defendant sets up is effective to confer the legal title on the defendant at the present time, the decree is a good defense at law, and it is upon this idea that the plaintiffs' counsel claims that the first part of the answer is bad, being an attempt to set up both an equitable and legal defense at the same time. If one have a good defense at law, he cannot be heard to set up an equitable defense. It is a *sine qua non* in an equit-

able defense, that the plaintiff has no defense at law. I am of opinion that the decree is not available, as conferring the legal title, or as a good defense at law. It was within the power of the court in the former suit to have compelled the parties who are now plaintiffs to execute conveyances, but the decree stops short of that. The decree seems to be, in fact, somewhat vague if not contradictory in itself; for it directs that the certificate or any patent issued in pursuance thereof be adjudged void and of no effect. The theory of cases where equity has relieved a rightful claimant under a patent issued to a wrong party, is, that such patent is effective to pass the title from the United States,—but the patentee is held to be a trustee for the benefit of the rightful claimant. The case made by the answer warrants the defendant, if he can now show that he is entitled to the premises, in asking to have the decree reformed for the purpose of enabling him to obtain the legal title. The material facts stated as new matter in that part of the answer that precedes the statement of a former suit, are those upon which the former suit is based, and are material and necessary to be set out in some form in his present answer, if the defendant would show a case in the nature of a bill of review or bill to reform the decree. These statements of fact, with the allegations in regard to the former suit, should all be taken as constituting but one defense.

The demurrer was overruled and the plaintiff filed a replication putting in issue much of the new matter alleged in the answer, and stating that said Richard White had no authority to bind the other plaintiffs by his alleged abandonment of the premises.

The answer was filed on the 17th of May, 1869. A replication was filed May 19.

At the October term, 1869, the defendant filed an affidavit showing that said S. P. Soule resides in Washington Territory; that in August last the defendant sent to said Soule a blank deed to be executed by Soule for the purpose of conveying to the defendant, in fee, the premises embraced in the mortgage; that on the day of filing the affidavit the de-

fendant had learned for the first time that the deed was executed and delivered. And the defendant moved the court for leave to file a supplementary answer. The plaintiff opposed the motion. The leave being granted, the defendant filed a supplementary answer, setting up that for the purpose of saving the expense of a foreclosure of the mortgage, said Samuel P. Soule and his wife conveyed said premises, in fee, to this defendant on the 6th of September, 1869.

On the trial the only material question of fact upon which the evidence was conflicting or doubtful, was the date of the decease of Caroline White, the wife of the plaintiff Richard, and the mother of the other claimants. The evidence establishes the fact that her decease took place on the 25th or 26th day of September, 1850, either one or two days before the passage of the donation act. The evidence shows that Richard White and his said wife settled upon 640 acres, including the land in controversy, in 1844, and resided upon it and cultivated a portion of it, up to the time of the wife's death; and that Richard White, with his children, continued to reside in the same house, situated on the south half of the 640 acres up to 1855 or 1856. Richard White filed a notification for himself and his wife's heirs December 9, 1852, claiming the whole 640 acres. He was afterwards advised that he could not hold more than 320 acres, in consequence of his wife having died before the passage of the donation law; and, if compelled to select, he preferred the south half.

At the land office an indorsement was written on the notification previously filed by him, in the following words:

"To C. R. Gardiner, Surveyor-General of Oregon: Being reduced to 320 acres, in consequence of the death of my wife before the 27th of September, 1850, I desire to retain the south half of my original claim.

Salem, Nov. 10, 1859.

RICHARD WHITE."

Said Richard White testified on the trial that the indorsement was written by the surveyor-general without White's request, and being advised by the surveyor-general that it

was necessary for him to sign it, he did so, knowing but little about his rights or the nature or effect of the indorsement.

Soule and his wife settled upon the north half March 27, 1855, filed a notification and settler's oath May 31, 1855, preliminary proof March 21, 1856, and final proof April 1, 1859. Soule and wife deeded to the defendant, Nov. 17, 1860, one part, and mortgaged the residue, and let the defendant into possession of the whole June 8, 1858. Soule was notified at the time of his settlement by the plaintiffs that the land was claimed by them. January 3, 1861, an order was made at the land office, that said Soule appear and show cause why a certificate should not issue to Richard White and the heirs of Caroline White.

It does not appear that either the defendant or Soule was notified of the order. Proceedings were taken at the land office, upon the notification filed by White on December 9, 1852, which resulted in a certificate issued September 22, 1862, to Richard White, for the south half of the claim, and to the heirs-at-law of Caroline White, for the premises in controversy, which certificate was followed by a patent, issued September 11, 1865.

The case was argued and submitted for final determination, on the pleadings and proofs.

UPTON, J., filed the following opinion:

Before examining what I deem the merits of the case, it is proper to refer to some points that arose in the course of the trial.

The deposition of Dr. Barclay was taken, out of court, before the trial. He deposed that Mrs. Caroline White departed this life on the twenty-sixth of September. That he noted the day of her death in his medical day-book, in these words: "Mrs. White died this morning." The answer was objected to as incompetent and not the best evidence. On cross-examination, he deposed in answer to interrogations, "I have examined the memorandum this morning." "Without looking at the memorandum, I could have stated the fact, but could not state the day of the month." "I

examined the memorandum some years ago, when a witness in the same matter, and have always recollected the day and date since that time."

The witness presented the book to the plaintiff's attorney at the time the deposition was taken.

On re-direct examination, the witness deposed: "I made the memorandum on the day of the occurrence. Since examining it, I know that the death occurred on the twenty-sixth of September, 1850."

The plaintiffs *now* move to suppress the deposition, because of the witness having looked at, and quoted from, a memorandum that is not *now* produced.

I think the motion to suppress the deposition should not be sustained. If the book had not been produced, the reasons for the motion would have been much stronger. Since the taking of the deposition, the production of the book is within the power of either party; and the cross-examiner has had an opportunity to inspect it. The quotation from the book was not competent evidence, but it was not asked for by either party. This parol evidence of the contents should be rejected, but there is no good ground for suppressing the whole deposition. The fact that a witness has refreshed his recollection by examining a memorandum recently before taking the stand, may go to the credibility of his statements, and is a proper matter of cross-examination, but it does not render him incompetent.

The objection to the supplementary answer, which the defendant has been permitted to file, would be of more weight, if the plaintiffs had shown that they had been misled, or taken by surprise. No objection, that the previous conveyance from Soule and wife was a mortgage and not an absolute deed, seems to have been made in the previous suit, nor on the demurrer in this suit, nor until after leave was asked to file the supplementary answer. The mortgage on the one part of the premises, accompanied by delivery of possession, seems to have been treated by all parties as if it was a conveyance in fee. The defendant, from the first, had an unconditional conveyance of one part of the subject matter of the suit, and as an unconditional conveyance of

the other part has taken the place of the mortgage pending the suit, I think it is beyond question that leave to file the answer was properly granted.

As to the alleged abandonment. If the plaintiffs ever became entitled to the land, it is not important whether or not Richard White once believed that he and the other plaintiffs were not entitled, or whether he once abandoned the intention of prosecuting their claim; for that would not divest him of a title actually acquired, much less would it divest the other plaintiffs. If the plaintiffs were persons entitled to claim a donation under the donation law, the legal title vested in them on the passage of the act, and not at a subsequent time. (13 Pet. 499.) If they ever had the legal title, the evidence fails to show that it has been divested by abandonment.

The objections made to the mode of proofs and other preliminary steps taken by White, in the land department, are of no force, because the patent proves the regularity of all preliminary proceedings. *Hoofnagle v. Anderson* (7 Wheat. 214.)

The case on its merits presents but two or three questions for consideration:

First. Did the settler, whose wife had died before the passage of the donation law, and the children of the deceased wife, become entitled to the three hundred and twenty acres known as the wife's share?

Second. If they did not, and were persons not authorized to take the donation, is the defendant in an attitude to raise the question of disqualification?

Third. Is it competent in this proceeding, to reform the decree rendered in the former suit?

The first of these questions was substantially determined by the supreme court of the territory of Oregon, in the case of *Ford v. Kennedy*, 1 Or. 166. The granting clause of the donation act relied upon by the plaintiffs, is in these words, "And in all cases where such married persons have complied with the provisions of this act, so as to entitle them to the grant, as above provided, whether under the late provisional government of Oregon, or since, and either shall have died

before patent issues, the survivor and children or heirs of the deceased, shall be entitled to the share or interest of the deceased in equal proportions." That court said, "The right to take donations under that section, is restricted to persons now residing in said territory, or who shall become residents thereof, on or before the first day of December, 1850. 'Such,' then, in that clause of the act, relates to the foregoing, as well as to the other qualifications of grantees under that section, and makes the clause mean as if it read, 'In all cases, married persons now residing in, or who shall become residents.'" The court refused to give the act a retro-active effect, or to adjudge a grant to, or a title in, persons who died before the passage of the act.

The facts of the present case differ from those in *Ford v. Kennedy*, in that the husband, as well as the wife in that case, died before the passage of the act. But if the principle there announced, is correct, it is fatal to the position here taken by plaintiffs' counsel, because, unless the law can have a retro-active effect, the donee, being a "single man" on the day the act passed, and not since married, within the period allowed for taking a claim, is limited by the terms of the act to 320 acres.

The soundness of the principle there announced, is attacked by the plaintiffs' attorney, whose argument displays great care and research in the examination of the subject. He claims that the donation law, both in spirit and by its terms, recognizes rights acquired under and sanctioned by the provisional government, and that the supreme court fell into an error by not giving sufficient consideration to the expression, "Whether under the late provisional government or since," and to the situation and condition of the territory and its inhabitants, at the time of the passage of the act. With that opinion standing as the decision of the supreme court, it would be supererogation for this court to enter into the subject further than to say, that the reasoning of the plaintiffs' counsel does not present that certainty, and that clear conviction of error, in the prior adjudication of the point, that warrants a circuit court, in departing so far from the rule, *stare decisis*, as to disregard what seems to

have been contemporaneous construction by the land department, as well as the decision of the highest tribunal of the territory, and to be in accord with the position announced by the supreme court of the United States, in the case of *Lownsdale v. Parrish*, 21 How. 290. If this question is still open to examination, its review should be had in the supreme court, either of this state, or of the United States.

The second question refers to the right of the defendant to raise the question of the plaintiffs' disqualification. There is a class of cases where land has been erroneously granted by the United States land department to persons not qualified according to the terms of the acts of congress, in which third persons claiming the same lands, as having been *subsequently* acquired, have been denied the right to plead the disqualification, upon the principle that it is a matter between the patentee and the government only. (*Moore v. Wilkinson*, 13 Cal. 478; *Terry v. Megerle*, 24 ib. 609; *Curle v. Burrell*, 3 Sneed, 62.) For the purposes of this case, it may be assumed that if the defendant had no right to or interest in the land, when it was granted to the plaintiffs, the defendant cannot raise the question of qualification or disqualification. But if the defendant then had a right to claim it, he may be heard to defend the right; and if the plaintiffs were not persons qualified to claim under the donation law, his standing upon this question depends on his relation to the land at the time it was granted to the plaintiffs. As has been before remarked, the donation act being in words of present grant, operated to convey the title at the time of its passage to the person possessing the prescribed qualifications and then settled upon the lands; but one not qualified took nothing by his *actual settlement and cultivation*. Whatever color of title passes to such unqualified claimant by virtue of a decision in his favor, he derives from the action and decision of the agents of the government in the land department. In this case the certificate was not issued, and the record discloses no decision made, until September 22, 1862. If the plaintiffs were not within the provisions of the act, they acquired no color of title until that time. The land up to that time was government land,

if the plaintiffs were disqualified. If the defendant's grantor lawfully settled upon the premises before it had been granted to another by the department, and before it was claimed by a qualified settler, his settlement and cultivation immediately gave him an interest. (*Doll v. Meador*, 16 Cal. 295: 12 How. 76; 13 Pet. 499.)

His settlement being made before the certificate issued, if the certificate was improperly issued to another, the defendant became so connected with the title as to be authorized to attack the certificate and the patent, if one was improperly issued.

The remaining proposition involves a question of practice upon which but few precedents are to be found, arising since the enactment of state codes dispensing with bills of review. By our code, § 377, whatever subject matter could formerly have been presented by any of the various formal chancery bills, may now be presented by an "original suit." And if the subject matter constitutes a defense, by §§ 72 and 93, it may now be presented by an answer.

Under the equity practice, a party claiming what is claimed by the defendant in this case, would have resorted to the circuitous method of filing a bill of review, or a bill in the nature of a bill of review; (1 Paige, 200; Coop. Eq. Pl. 73; 2 John. Ch. R. 488;) and of enjoining the action at law until he could be heard in equity.

The former decree was rendered on the twenty-second of December, 1863, and the patent was issued to the plaintiffs September 11, 1865. If there was not such error or omission, in the rendition or entering of the decree as would sustain a bill of review, the defendant being *cestui que trust* of the premises, and without any other means of obtaining the legal title or other means of defending himself against the acts of his trustees, would have been allowed to file his supplemental bill, setting up the issuing of the patent.

The plaintiffs should have a decree for the parcel of land not embraced in defendant's deeds, and the defendant should be decreed the residue of the premises. And the decree of December 22, 1863, should be so reformed as to declare the patentee, to that extent, a trustee for this plaintiff, and the trustee should be compelled to convey.

CIRCUIT COURT OF WASHINGTON COUNTY, OCTOBER TERM, 1869.

WM. WHITE v. J. W. THOMPSON, NORMAN MARTIN AND
—— BRIDGWATER.

REGULAR PROCESS PROTECTS AN OFFICER.—An attachment issued on an insufficient affidavit will protect the officer who served it, but not the party and justice of the peace who caused it to issue.

JUSTICE'S DOCKET ENTRIES.—When a judgment is attacked collaterally, a court will not look outside the record to learn that the appointment of a special constable was not properly made.

EFFECT OF APPEARING.—When a docket entry shows that the defendant appeared, and does not show that the appearance was special, parol evidence will not be heard to attack the judgment collaterally.

IDEM.—Withdrawing defendant's appearance does not oust jurisdiction of the person.

EXEMPTION FROM EXECUTION.—Property cannot be recovered as exempt from execution "unless selected and reserved by the judgment debtor, or his agent, at the time of the levy or within a reasonable time after the levy shall be known to him.

IDEM.—When the constable was about to levy on wheat, and the defendant asked him to levy on the defendant's team, in place of the wheat, claiming no exemption, the levy is good.

ACTION for damages for the taking and detention of a pair of horses, the property of the plaintiff.

The answer defends, on the ground that the property was taken under an attachment, issued by the defendant, Martin, who was a justice of the peace, in an action for \$29, commenced before him by defendant, Thompson, against this plaintiff, and was delivered to and served by defendant, Bridgwater, who was specially appointed by the justice, to serve the attachment; and alleges that eleven days after the seizure, Thompson obtained judgment in the action and issued execution, and Bridgwater, being specially appointed for that purpose, levied upon, and from that time held, the property on an execution.

The replication denies that the court had jurisdiction of the person of the defendant, jurisdiction to issue the attachment, under the judgment, or to issue the execution; and denies that the attachment was duly or regularly issued, and makes the same denials in regard to the execution.

The justice's docket was introduced in evidence, which contains the following entry: "H. Jackson, having appeared as attorney for the defendant, made and filed a motion to discharge the attachment above stated. Said motion being denied, the defendant withdrew."

The affidavit for attachment was as follows:

"In justice's court, before Norman Martin, for the precinct of Wapato, state of Oregon, county of Washington.

"J. W. THOMPSON
v.
"WILLIAM WHITE. }

"J. W. Thompson, the plaintiff above named, being duly sworn, says:

1. "That a sufficient cause of action exists in his favor against the defendant, William White, the grounds of which appear in the sworn complaint hereunto annexed, all the statements contained in which are true to the knowledge of this deponent.

2. That the defendant is about to convey away and dispose of his personal property in such a manner as thereby to defraud his creditors of their just and lawful dues.

3. That the said plaintiff has commenced an action in this court by issuing the summons hereto annexed against said William White, upon the cause of action above annexed."

Subscribed and sworn, etc.

The affidavit was not annexed to the complaint or summons. The evidence shows that said White (then defendant) was a farmer at the time his team was levied upon. That the acting constable, Bridgwater, was about to levy on a quantity of wheat, but said White, desiring to use the wheat, requested the constable not to take it, but to levy on something else instead. Thereupon the constable took the horses in White's presence, and without objection. Parol evidence was offered, to show that the defendant's appearance in the original action was special. Both the attachment and execution were regular on their face.

H. Jackson, for the plaintiff, claimed that the appearance in the original action was special, and did not confer juris-

diction of the person, so as to enable the court to render judgment on the merits, after the defendant withdrew; that the defendant should show a case within sec. 120, p. 605 of the Code, to authorize a special constable; that the affidavit was insufficient; and that the property was exempt from execution.

W. D. Hare, for the defendant.

The writ protects the officer. The appearance of the defendant is shown by the docket, and does not appear to be special. The levy on the horses was made at this plaintiff's request. He did not demand the property as exempt. (Code sec. 279.) The affidavit for attachment is colorable, and sufficient to give jurisdiction.

UPTON, J. The following rulings were made in the case:

The affidavit for the attachment was insufficient to confer jurisdiction to issue the writ.

The writ of attachment is regular on its face, and protects the officer when sued for damages only.

The order appointing Bridgwater to serve process is in the form prescribed by sec. 120 of the justice's act. The court had jurisdiction to pass upon the necessity of the appointment, and has made such record as the law requires. When a court has acquired jurisdiction and is acting within it, error will not be presumed.

There being no fraud alleged, parol evidence is not admissible to dispute the docket of the justice of the peace, or to so explain it as to make it import a want of jurisdiction, when on its face it imports jurisdiction of the person.

The docket entry is evidence that the defendant appeared in the cause, and the appearance is equivalent to service of summons. The defendant's withdrawal from the cause did not oust the jurisdiction. The court had jurisdiction to render judgment and issue the execution.

A void attachment, although regular on its face, does not protect the defendants Thompson and Martin.

Property can not be claimed as exempt from execution, unless "selected and reserved by the judgment debtor or his agent at the time of the levy," or before sale and within

a reasonable time after the levy shall be known to him. It is too late, for one knowing of the levy from the first, to set up the claim after sale. (Code sec. 279.)

The plaintiff should recover from the defendants Thompson and Martin for the detention, from the time of the seizure of the property to the levy of the execution.

The plaintiff had a verdict for \$24.00.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1869.

B. S. BOYDSTON v. J. S. GILTNER.

PLEADING.—The complaint contained the following statement: "The fracture was a simple fracture, and one that could easily have been reduced and caused to heal and become strong by a surgeon of ordinary skill, by ordinary diligence and care," and the statement is not denied by the answer." *Held*, that it is admitted that the fracture is a simple fracture, but the statement that the injury could have been cured, etc., is a conclusion, and is not to be deemed admitted.

EXPERT.—**OPINION.**—A medical expert was not permitted to give his opinion in regard to the skill of the defendant, but was allowed to state how [with what degree of skill] the defendant performed a certain surgical operation. *Williams v. Poppleton*, referred to.

SURGEON, DISCRETION OF.—If a surgeon purposely refracture a broken arm without informing the patient of the nature of the operation, it does not follow from that fact alone that he was guilty of bad surgery.

GROSS IGNORANCE.—But if the arm was refractured by the defendant because of gross ignorance or the want of ordinary care or skill, that act of itself renders the defendant liable.

COMPROMISE VERDICT.—Jurors not to compromise in this class of cases contrary to the individual juror's convictions of the truth.

THE complaint alleges that the bones of plaintiff's right arm were broken about midway between the wrist and the elbow. That the fracture was "a simple fracture, and one which could easily have been reduced and caused to heal and become strong, by a surgeon of ordinary skill, by ordinary diligence and care." That the defendant, as a physician and surgeon, undertook the case for hire, and that the plaintiff strictly followed the directions of the defendant. That the defendant, "by reason of gross ignorance,

carelessness and inattention to his duties as surgeon, entirely failed to treat said limb with ordinary surgical skill," and by reason of said failure, said fracture was not reduced and said bones have failed to unite, "and said fore-arm is crooked and deformed, and plaintiff has lost the use of said arm."

The complaint sets out loss of time and expenses incurred; and claims \$10,000 damages.

The answer denies want of care, skill and diligence; denies ignorance; denies that plaintiff followed defendant's directions; alleges that the injury was treated with care, skill and diligence; alleges that the fracture was properly reduced and treated, and that the bones of the arm became firmly and properly united, and that in that condition the plaintiff was discharged from defendant's care, and that "the plaintiff did not in divers ways and at divers times follow the directions of the defendant."

The replication denies the new matter alleged in the answer.

Logan, Shattuck & Killin, for the plaintiff.

Caples & Moreland, for the defendant.

The case coming on for trial, a jury was impaneled, and on motion of the defendant, all witnesses, except medical experts, were directed not to be present at the examination of other witnesses.

The plaintiff, *B. S. Boydston*, sworn:

"My arm was broken about the middle of August, 1868. At the first the defendant applied a splint. * * * The second or third day he dressed it again in a similar manner. A little more than three weeks after the injury, defendant took the splint off at his office, examined the arm particularly, and said, 'It has commenced to heal.' He then did it up in a hurry and went away, saying he would be back in half an hour. He came back in half an hour and took the bandage off; the arm lying along on the table, and the hand fell over on to the palm. I said to him, 'You said it had united.' He replied, 'It was just stuck.' I

was under defendant's care in all about three months. At the end of that time the arm was in the condition it is now." (The arm was exhibited to the jury; its present condition was thus described by a medical expert):

"The injury was an oblique fracture of both bones of the right forearm (*ulna and radius*) just below the middle. The fragments have united in a deformed or crooked condition. That is, the superior or upper end of the inferior or lower fragment of the *ulna* projects backwards and slightly upwards—in other words, *overrides* the upper fragment of the same bone (the *ulna*). The superior or upper end of the lower fragment of the *radius* projects a little forwards, or in technical language *anteriorly*. The right hand is considerably turned inwards—or *pronated*. The forearm presents a distorted and twisted appearance, with somewhat of a lump or projection on the back of the seat of fracture.

"The union is probably *osseous* or bony. The arm is almost as strong—though not as useful as prior to the injury. The injured fore-arm appears about three fourths of an inch shorter than the other, and is flexed or bent forward or inward at the point of fracture; the direction of the arm from that point to the wrist being about eight degrees from the natural position."

The plaintiff testified further: "I followed the defendant's directions as to the treatment. When defendant discharged me he took the splints off, helped me to put my coat on, and said 'It is all right.' About three weeks after that he looked at it; he said 'It is crooked.' I told him it was just so when he discharged me. He told me to come to his office. By his advice a tin straightener or splint was made and applied, in order to render the arm more straight."

Dr. Watkins, testified: "Last spring I saw the arm. The *radius* was slipped-by a little more at its fractured ends than the *ulna*. I think the *ulna* was united, and that the *radius* had not a bony union. The arm was somewhat bent. Ordinarily the bones will unite in six or eight weeks. There is a union of the *radius*, the union is *cartilaginous*. If bony union had taken place, and the bone became solid, a steady strain would not displace it (so as to cause an angle).

If the fracture is very oblique it will be more difficult to keep the bones in place."

Dr. Chapman testified: "I saw the plaintiff's arm nearly a year ago; it was crooked. He was at work, but had not a good use of it. My mode of treating such a fracture, after reduction, is to dress it in splints, putting a roller bandage on first, then splints on the inner and outside of the arm, and bandage outside or over the splints."

Dr. Wythe, deposed: "I saw the arm about — months after the injury. I advised that it be broken over again."

Burch, Starr, and Hay, each testified that the arm was about in its present condition, when the plaintiff was discharged from treatment.

The defendant, *Dr. J. S. Giltner*.—Testified in his own behalf. "I am a physician and surgeon. I was graduated in 1836, at the medical college of Pennsylvania. When called to treat the plaintiff, I reduced the fracture, and applied a roller bandage, commenced bandaging at the fingers, and carried it up towards the elbow, then applied splints on the inner and outer side of the fore-arm. I applied a compress (made by wrapping a small stick with cloth) on the inner and outer side of the arm, under the splints, to press between the *ulna* and *radius*. When the splints were wrapped, I placed the arm in a sling, with the hand in a position between *supination* and *pronation*. On the morning of the eighth of September, plaintiff came to the office, and the bandages were loose. I examined the arm; the fractured parts were in proper position, and were as when the fracture was first reduced. I saw him on each alternate day after that. On the twelfth and fourteenth of September, I told the plaintiff I wanted he should procure another surgeon, to act in consultation with me; that I was not disposed to take the risk of a prosecution. He said that if I did the best I could, I should not be responsible for the result. I took off the wooden splints on the thirty-first of October. The arm was then straight, and in proper shape. I then dressed it again, using pasteboard splints. I then discharged the plaintiff, telling him to wear the pasteboard splints six weeks. Before the wooden splints were taken

off, plaintiff told me he had removed the bandages, because they were painful. He went to work in a tin shop without my knowledge. Dr. Wythe being consulted, advised with me, the support made of tin. The *ulna* and *radius* were both fractured, the latter obliquely. If the bones had been grown together, they could have come to their present position without a refracture. But not so, if they had been joined by a bony union. I follow Gross' system."

Dr. Chapman, called by defendant, testified: "There are cases where, although the bones are in proper position, a bony or *osseous* deposit will not take place. The first union is *cartilaginous*; after a long time generally, the *cartilaginous* deposits will gradually assume an *osseous* character, and may in time become bone."

This statement was objected to, and the plaintiff moved to strike it out, on the ground that the plaintiff alleges, (which the answer does not deny), that the fracture was simple, and the injury one that could have been easily cured: *Held*, that the allegation that the fracture was a "simple fracture," must be deemed admitted, but the statement that the injury could have been cured by ordinary care and surgical skill, is the statement of a conclusion, and cannot be treated as a fact, admitted by the pleadings. The motion was overruled.

Dr. Bodman, testified: "Absorption may take place after the fractured bone has united. It may be caused by too much exercise, by physical debility, or other and perhaps complicated causes."

Dr. Loryea, testified: "A proper degree of excitement in the system favors the secretion and deposit about the place of fracture, of plastic *osseous* matter, that afterwards takes the consistency and form of bone. But if the system becomes too much excited, amounting to inflammation, the deposit will be suspended. If the excitement ceases and the system becomes torpid, that will also suspend such secretions. My opinion is, that the *ulna* is in a state of *osseous* union, and the *radius* in a state of *cartilaginous* union, and that it is probably the union of the two bones with each other that now prevents the ordinary and natural mo-

tion of the wrist. What union there is, is very nearly a bony union. When the *nutricious* artery is injured, ossification will be tardy."

Rev. Mr. Myers, sworn: Corroborated the statement of Dr. Giltner as to the mode of dressing the arm in the first instance. And testified that both arms appeared of the same length at the time defendant was discharged from treatment.

F. M. Grey, testified: "On one occasion, when the defendant was dressing the plaintiff's arm, the plaintiff said he had dreamed and hurt his arm in the night. And that the bandages had become loose. About the time the defendant was discharged the arm was straight and of the same length as the other. When the defendant looked at it some weeks after that, a lump was on it, and the plaintiff then said 'it was straight when the splints were taken off,' and that the lump 'had come since.'"

Dr. R. Glisan, testified: "I have been acquainted with the defendant and his practice four or five years. I once saw him amputate a fore-arm."

Question.—"Have you known enough of his practice to be able to judge in regard to his skill as a surgeon, and if yes, what is your opinion on that subject?"

The question was objected to as incompetent and the objection sustained.

Question.—"How did he perform the surgical operation you have witnessed?"

The same objection was made, but was overruled, and the witness answered:

"He performed the operations skillfully." Witness continued—"If this fracture was properly reduced, and if a bony union then took place, the parts might acquire their present position by a re-fracture, or possibly by re-absorption of the *osseous* deposit. Cases of such absorption are rare."

Cross-examined.—After a firm cartilaginous union, it would not be likely to get into this position, but if the union was slight, such a thing would not be very uncommon or very improbable.

Question.—"If the arm had not been reduced or dressed with splints, what would have been its present condition?"

Answer.—"The same as it is now."

Mr. Crouch, testified: "About the tenth of January, I heard plaintiff say his arm was getting along pretty well, and that he took the splints off because they hurt him while turning the crank at the tin-shop."

John Kersher, testified: "In March I heard the plaintiff say he took the splints off because they hurt him when he was at work."

Parrish Giltner, testified: "When the defendant took the wood splints off, he told the plaintiff he ought not to work for some time. My father (the defendant) measured both arms at that time; they were of the same length."

The evidence also showed that the plaintiff, about the time or soon after the wood splints were permanently removed, commenced to exercise the arm by turning a light crank of a machine used for rimming or edging small tin-can heads.

The plaintiff testified that the exercise was in pursuance of defendant's advice and direction. The defendant testified the contrary. The plaintiff testified that he wore the paste-board splints after his discharge, and while exercising, for some weeks, and that he wore them until they were literally worn into fragments. Several medical experts were examined as to the probability of the present condition of the arm being produced without a perceptible and painful re-fracture, if *osseous* or *cartilaginous* union had once taken place, while the fractured parts were in apposition. But no very decided opinions were elicited on that point.

UPTON, J., in charging the jury, after stating the issues made by the pleadings, explained the duties and liabilities of physicians and surgeons, substantially as in the case of *Heath v. Glisan et al*, the judge proceeded to say: "If you should find that Dr. Giltner, the defendant, refractured the arm, it does not follow from that fact alone that he was guilty of bad surgery. Nor does it follow from the fact that the plaintiff was not informed what the surgeon was doing or about to do. If you find from the evidence that the arm was purposely refractured by the defendant under circumstances that disclose a want of ordinary care and skill on his

part—or that he refractured it improperly, either because of gross ignorance or the want of ordinary care or skill on his part, that act of itself renders the defendant liable. But unless you do find from the evidence both that the defendant refractured the arm, and that it was the result of a lack of ordinary skill or care, there is no blame to be attributed in consequence of that act, and your inquiries should be directed to other branches of the case.

Counsel both for the plaintiff and for the defendant have remarked upon the propriety or impropriety of what they term a compromise verdict. In regard to that, it is my duty to say to you, that jurors should carefully and patiently canvass and examine all the evidence, with an honest and conscientious effort to reconcile any differences of opinion they may entertain of the truth of the matters put in issue. And it is sometimes the case, when only dollars and cents are involved, when it is probable the exact truth can never be known, and where there is an honest difference of opinion among jurors, as, for an instance, when the matter between the parties is the state of their accounts, which have been loosely kept, and there is doubt as to the true balance, that concessions may be made for the benefit of both parties, which are not fully in accord with the individual juror's view of the facts proved. But in this class of cases, each party has a right to insist that the jury, and each juror, should render a verdict, if at all, literally "according to the law and the evidence, as given on the trial."

When a man enters upon a trade or profession for his life's business, he stakes the efforts of a lifetime in building up for himself a character and a name in that trade or profession; and if the plaintiff's case is not established by the proofs, the defendant is entitled to a verdict at your hands, which you have no right to withhold from him. But if the defendant assumed to act in a profession of which he is grossly ignorant, or if, after undertaking the grave responsibility of treating the plaintiff's broken limb, he has failed to treat the case with that ordinary care and skill that every one has a right to expect of his physician and surgeon, and has thus deprived the plaintiff, for the remainder of his life,

of the proper use of his right hand, your verdict should compensate the plaintiff for the injury he has sustained, and place a mark on the defendant's professional standing that time will not efface.

The jury rendered a verdict for the defendant.

MULTNOMAH CIRCUIT, NOVEMBER TERM, 1869.

THE CITY OF PORTLAND v. JOHN WHITTLE.

DEDICATION.—When the owners of land lay it off into blocks and streets, and sell lots abutting on a street so laid off, so that the street is a convenience to the purchasers of the lots, those acts amount to a dedication of such street.

DEDICATION BINDS PURCHASERS.—Such persons, and all persons subsequently claiming under them, are bound.

NOT REVOCABLE.—When the land is dedicated by the owners and becomes a street, the subsequent assent of such owners, that it should be used as a public square, would not change its character from that of a street.

CITY COUNCIL.—If the *locus in quo* is a street, an order of the city council directing it to be fenced up is void.

In form this was an action for a violation of city ordinance No. 321, which provides against breaking "any gate or fence placed around any public square" of the city of Portland. It was tried in the recorder's court, and judgment being had against the defendant, he appeals to this court.

David Logan, Esq., for the defendant, admits that the defendant forcibly broke the gate and entered upon the premises in question; namely, the ground commonly called "the public square," situated between Madison, Salmon, Third and Fourth streets in the city of Portland. But he says the gate, and the place upon which the defendant so entered, was on a public street called "Main street," which runs through and over the centre of the said ground called the public square. That the officers of the city had unlawfully caused a fence, and the said gate, to be erected across said Main street. That the entry was made in the course of

defendant's lawful use of said street, without unlawful design or intent, and for the purpose of testing the question whether the place of said entry is a public street of the city or a public square of the city.

C. A. Dolph, Esq., city attorney, for the plaintiff, claims that the ground in question is a public square. He also claims that the question whether it is lawfully so or not cannot be tried here; that the city council are clothed with discretion to the extent, that if they erroneously erected such fence, it is not the right of an individual to remove it by force.

The plaintiff introduced city ordinance No. 148, passed October 22, 1863, directing the ground to be fenced. Defendant admits that the city council directed the fence and gate to be erected, and that said council also approved and accepted the work.

The proof shows that the title of the city to the premises rests upon dedication made by the owners of the soil, there being no deeds of conveyance and no written evidence of right in the city, except certain maps made by the owners of the soil at the laying out of the city into town lots; that at the time the proprietors of the soil laid out the surrounding grounds into blocks and town lots, for the purpose of sale, the maps used by them represented the premises in question as consisting of two blocks, numbered 53 and 54, each two hundred feet square, and separated from each other by a street sixty feet wide, running through said premises, marked "Main street;" that said maps were publicly used and known in the city; that upon such representations made by the proprietors of the soil, said surrounding grounds have been by them sold as town lots; that many of the lots so sold abut upon Main street;* that the city au-

* NOTE.—The maps or town plots used by the proprietors and those occupying lots as early as 1850, represented Main street extending through the premises in question. These maps, which were relied upon as authentic and approved by the city council as late as 1856, represented several public squares, which the city holds in different parts of the town, and claims by virtue of dedication by owners of the soil. All these squares are denoted on said maps by a particular color, different from that on any other lots or blocks, and blocks 53 and 54 have the same coloring on these maps that is used to denote the other public squares. But the space in controversy, sixty feet wide, is left between these two blocks uncolored, and is represented as a street passing between these two blocks, and marked "Main street" on said maps; and blocks 53 and 54 are marked 200 feet square and surrounded on all sides by black lines, separating those blocks from said Main street in the same mode as from other streets.

thorities accepted of the said dedication, as made and evidenced by said maps, and with a knowledge that the same proprietors of the soil who made the said maps and the said dedication, had sold divers city lots abutting on said Main street—there being no evidence of any title in the city or in the public to the premises, except that of the dedication aforesaid. The case was submitted to the jury.

UPTON, J. instructed as follows:

If you find that the whole premises enclosed, including blocks 53 and 54 and the space between them, marked on the map "Main street," is one public square, not subject to a right of way from east to west through the middle of it, the plaintiff is entitled to a verdict.

If you find there are two public squares within the enclosure, and that Main street is a public street, leading through the premises in question, your verdict should be in favor of the defendant.

When a man or company of men own land, and lay it off into blocks and streets, and sell lots abutting on a street so laid off, so that the street is a convenience to the purchasers of the lots, those acts amount to a dedication of the land so laid off into streets, and the persons so laying it off can not recall it or in any manner prevent its being used as streets.

Such persons are barred or estopped by their acts, and all persons or corporations subsequently claiming under them are equally bound.

If the city derives its title from Lownsdale, Coffin and Chapman, or from either of them, and that part of the premises on which the gate was placed was dedicated as a street before or at the time the city became owner of the blocks 53 and 54, the city can not now claim that it is not a street.

If the owners of the soil once dedicated it, and it became a street, their subsequent assent that it should be used for a public square, would not change its character from that of a street.

If the place in question was a public square and not a street, the acts of the city council in regard to it are valid. But if it was a street, the council had no authority to order

it fenced up, and in that case, any order of the city council directing it to be fenced up is void.

The jury rendered a verdict for the defendant. The plaintiff moved for a new trial, and, after argument, the motion was overruled and judgment rendered in favor of the defendant.

3 135
3 512
10 225
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28* 138

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1869.

L. BESSER v. J. C. HAWTHORN *et al.*

FORECLOSURE OF MORTGAGE, EFFECT OF.—Where S. conveyed land to A. and took back a mortgage for the purchase money which was duly recorded, and A. mortgaged the same land to B., and the latter mortgage was also duly recorded. And afterwards S. foreclosed his mortgage without making B. a party to the suit of foreclosure, and S. purchased the premises under the decree of foreclosure, and regularly obtained his sheriff's deed under the decree, and then sold and conveyed to H. The title of H. is subject to the mortgage executed by A. to B.

PARTIES ON FORECLOSURE.—When the statute is silent as to the necessity of making a junior mortgagee a party, the rule applies, that all incumbrancers, as well as the mortgagor, should be made parties, if not as indispensable, at least as proper parties to the suit, whether they are prior or subsequent incumbrancers.

IDEM.—If any incumbrancers, whether prior or subsequent, are not made parties, the decree of foreclosure does not bind them.

LEGAL TITLE OF MORTGAGOR.—Equity of redemption defined. Our system has so changed the law, that the mortgagor retains the right of possession and the legal title.

REDEMPTION.—The equity of redemption cannot be cut off, unless by the intervention of a court or by an actual conveyance by the mortgagor.

IDEM.—It cannot be divested by a suit to which the mortgagee is a stranger.

IDEM.—The statute defining the mode of redemption does not create the equity of redemption. It only defines the modes in which that right is to be exercised.

JUNIOR MORTGAGEE.—A junior mortgagee is not so far bound by a decree rendered without notice to him, as to be compelled to apply by bill for leave to redeem. But he may resort to the ordinary mode of foreclosure as if no sale had been made.

ACCOUNT.—If the rule formerly bound the party not served, to abide "*by the account,*" unless he could show fraud or collusion, it does not follow that his *right to redeem* was cut off.

MERGER.—When the holder of the senior mortgage, purchased the premises under the decree of foreclosure, and acquired the *legal* title, the equity which he previously held, would, by strict rules of law, be deemed merged in the legal title.

IDEM.—But it has long been the practice in courts of equity to hold the legal and equitable title distinct, although both were vested in the same person, when it can be clearly gathered from all the proceedings that such was the intention of the holder when he acquired the legal title. And whenever the nature of the case shows that such severance of the legal and equitable title is evidently to the interest of the holder, such intention will be presumed.

PRIORITY.—On a foreclosure of a junior mortgage, the proceeds will be applied; first, to satisfy the prior mortgage; second, the junior mortgage; and the residue to the holder of the legal title.

INTEREST.—A note, made before the passage of the statute prescribing rates of interest, which calls for three per cent. per month, will be enforced according to the terms of the note.

THIS is a suit to foreclose a mortgage, executed on the twentieth of June, 1859, by Cincinnatus Shultz and his wife, to the plaintiff, to secure the payment of \$500, two years from its date, with interest, at three per cent. per month.

On the seventh day of the same month, said Cincinnatus Shultz had purchased the lands thus mortgaged, from James B. Stephens, and had given his note, payable in ninety days, for \$400 of the purchase money and interest. Said Shultz and his wife then executing a mortgage on the same lands, to James B. Stephens, to secure the \$400 and interest, which mortgage was recorded on the twentieth of June, 1859.

The mortgage from Shultz and wife, to the plaintiff, was duly recorded on the twenty-first of June, 1859.

In October, 1859, Stephens commenced suit of foreclosure, to recover the \$400 and interest, making said *Cincinnatus Shultz and Mary, his wife*, defendants, and omitting the subsequent mortgagee, *L. Besser*, and on the twenty-third of November, 1859, obtained a decree of sale, to satisfy principal and interest, then amounting to \$424.60. On the thirty-first of December, said Stephens purchased the block under said decree, for \$620, and received a sheriff's deed on June 22, 1860, duly approved by the court, and caused the same to be recorded.

On the twentieth of December, 1860, said Stephens and

his wife, conveyed the premises to Mary White, and her deed was recorded September 25, 1865. On the thirtieth of October, 1866, said Mary White and her husband, W. L. White, conveyed the premises to the defendant, James C. Hawthorn.

On the thirtieth of January, 1867, the plaintiff filed his bill in this suit, against said Shultz and wife, and said J. C. Hawthorn, to foreclose the junior mortgage.

The cause was submitted on the pleadings and written evidence.

Mitchell, Dolph and Smith, for the plaintiff. •

J. H. Reed, for the defendant.

UPTON, J. The controverted questions in this case, arise from the failure to make Besser, the junior mortgagee, a defendant in the original foreclosure suit, instituted by Stephens.

The statute in force prior to 1862 was silent as to the necessity of making a junior mortgagee party upon foreclosure, and the general rule, as stated in Story on equity pleadings, § 193, "That all incumbrancers, as well as the mortgagor, should be made parties, if not as indispensable, at least as proper parties to such a bill, whether they are prior or subsequent incumbrancers," was then undoubtedly applicable.

But counsel in the argument of this case differ radically from each other in defining the position and rights of one who is "not an indispensable party," and as to the effect of omitting to make such an one a defendant. The plaintiff claims that, if omitted, he is in no case, and in no way, bound by the decree. But the defendant urges that he is bound by the decree, and can only attack the proceedings on the grounds of fraud or collusion; and he refers to a note appended to § 193 Story's Eq. Pl., and numerous English cases there cited, to the effect:

1st. "That mortgagees have been allowed to foreclose in the absence of subsequent incumbrancers."

2d. "That the decree is not conclusive upon subsequent

mortgagees who are absent, and that upon *proof of collusion* they have been allowed to *open the account*."

From these and other authorities introduced by the defendant, he argues that *nothing else* would be left to the junior mortgagee who is not served, but the privilege of opening the account on proof of *fraud* or *collusion*. And that in every other respect his position would be the same as if he were served: that his right to redeem would cease sixty days after a confirmation of sale, or under the act of 1854, three months after the day of sale.

The authorities cited in the note are not accessible to us, and the inference sought to be drawn does not necessarily arise from the language of the note.

It may be a sound rule, that the junior mortgagee, not served, should be bound by the *account*, unless he can show *fraud* or *collusion*, and yet it may not follow that his right to *redeem* is forever cut off by a proceeding in which he was not a party, and of which he had neither actual nor constructive notice.

The construction thus placed upon the language of the note is also in direct opposition to the text with which it is cited. For the learned author says in the same section: "If, indeed, any incumbrancers (whether prior or subsequent) are not made parties, the decree of foreclosure does not bind them, as also a decree of sale would not."

Formerly, on the execution of a mortgage, the legal title and the right of possession passed to the mortgagee.

The mortgagor retained an interest in the premises, but it was simply a right to redeem—a right lying dormant in him for the present, but which by payment and discharge of the debt, would ripen into a power in him, to demand and have the legal title by a reconveyance. From the meagreness of this interest, and for the want of a more appropriate designation, the estate or right remaining in the mortgagor was called "the equity of redemption." The name indicates in a marked manner the nature of the right or property remaining in him. Yet, intangible as was his right or interest, it was capable of subdivision by the execution of one or more junior mortgages. In which case, the original

mortgagor, who had already divested himself of the legal title by conveying an estate in fee to the first mortgagee, could, by the execution of a subsequent mortgage, convey that which was theoretically treated in some respects as a legal title, and which, by the action of the subsequent or junior mortgagee, might be converted into a legal title. For it gave to the latter the right to redeem from the prior mortgagee, and to entitle himself to have the possession and to hold the legal title subject to the original equity of redemption.

Our system has so changed this class of contracts, that the mortgagor retains the right of possession and the legal title. But we still call the interest remaining in him "The equity of redemption." We still respect the aphorism "Once a mortgage always a mortgage," and under the law, the equity of redemption can not be barred, brought to an end, or cut off, unless by the intervention of a court, or by an actual reconveyance by the mortgagee. Before any foreclosure takes place, the junior mortgagee occupies an intermediate position in point of priority, or of superiority of right, between his mortgagor and the mortgagee under the senior mortgage. For the junior mortgagee, by taking the mortgage, voluntarily accepted a security which is subordinate to the rights of the latter, and the original mortgagor, by giving the mortgage, has consented that all the interest which remained to him, after he executed the first mortgage, should be subjected to the rights of the junior mortgagor.

Virtually the mortgagor has made a conditional assignment to the junior mortgagee of all his interest in the premises, intended to be valid and binding on him until he redeems and cancels the junior mortgage. This includes, among other rights with which it clothes the junior mortgagee, that of redeeming from the prior mortgage, and of *substituting himself* in the place of the prior mortgagor as the party having the right to redeem.

How far, then, is the prior mortgagee bound by this transfer, made subsequent to his mortgage? Every system of jurisprudence recognizes in the mortgagor the power to make a valid and effectual assignment and disposition of *all*

his interest in the mortgaged premises. His assignee has the right to redeem, and must be made a party to the suit in order to foreclose, and the rule goes so far as to declare it unnecessary to make the mortgagor a party after he has absolutely transferred all his interest to another.

The mortgagor's interest being assignable, as a whole, it would seem to follow that any lawful assignment of a part of his interest, would clothe the assignee with similar rights *pro tanto*. If the mortgagor should assign one of several parcels mortgaged, or an undivided part of the whole, I think it cannot be argued, either upon authority, or the reason of the matter, that the assignee could be barred of his right to redeem, without making him a defendant.

He stands as a substitute for the mortgagor, having such an interest as the whole world, including the mortgagee, is bound by if chargeable with notice.

While such assignee of the legal title, is a substitute for the assignor, the junior mortgagee is not absolutely substituted, but he is conditionally substituted, and placed in the intermediate position above suggested, of which position, by force of the recording act, the whole world is bound to take notice.

The same principles and reasons that will reach the case of an assignee of the whole of the mortgagor's interest, and entitle him to a standing in court, will also reach the junior mortgagee.

This right cannot be denied to him, on any supposable ground, except that the prior mortgagee acquired such rights and power over the premises, that the mortgagor could not make a subsequent mortgage.

If the mortgagor can, without the mortgagee's consent, make a junior mortgage, having the force and effect to make the junior mortgagee a redemptioner, and which, upon being recorded, has the effect to notify the whole world of a right of redemption existing in the junior mortgagee, it follows that he cannot be divested of this right in a suit, to which he is not a party.

The argument of defendant, that the statute, in regard to the time and mode of redeeming after sale upon execution,

has abolished all existing rules as to the rights of redemption, although plausible, is without foundation. The right to redeem is an incident of the original mortgage. It existed in the mortgagor as soon as the first mortgage was executed, subject only to the maturing of the note. It so existed, liable to pass by assignment to his grantee. And it existed in his grantee as an equitable right, from the time of the grant to him, whether the assignment is made by an absolute deed or by a mortgage. The statute, instead of creating a right to redeem, only relates to the mode in which the right may be annihilated. The statute does away with the idea of a strict foreclosure, and substitutes the process of sale; and it expands the lifetime of the equity of redemption to a certain time after the sale, or after its confirmation. The right to redeem cannot be said to be in any sense the creature of the statute, and there is no reason, based upon such an idea, for construing the statute strictly as against that right. To argue that the statutory provisions settle this question, is to beg the question; for the construction of the statutory provisions which declare who may redeem, so far as they relate to a party not served with process, depends entirely on the original question with which the argument commenced; that is, whether one who was not served is barred of his equity of redemption by a sale.

The next question, I think one of more difficulty; that is, whether the junior mortgagor, not having been served, should be so far bound by the decree as to be compelled to apply by bill for leave to redeem from the prior mortgage, or whether he may proceed in the ordinary mode to foreclose his mortgage.

In favor of the former position, the defendant cites the case of *Bank of United States v. Corroll et al.*, 4 B. Monroe, 40. That case differs from the one before us in the very important particular, that the subsequent mortgage, or rather trust deed, was a secret conveyance, of which the prior incumbrancer had no notice until after the foreclosure and sale to him under the prior trust deed. I think it would not be contended, that, if in this case the prior mort-

gagee had had no notice of plaintiff's mortgage until after his purchase under the decree of foreclosure, the defendant's title would be subject to the plaintiff's claim. Under that view the case last cited is not in point.

The next case cited is that of *Wood v. Oakly*, 11 Paige, 400. The case rests upon the construction of certain statutes providing for notice in the nature of *lis pendens* and their effect, and affords very little aid in determining what is a correct rule in the absence of statutory directions.

The conclusions drawn from *Lowd v. Carpenter*, 2 P. Will. 482, that *lis pendens* is tantamount to actual notice, are applicable only to deeds and incumbrances executed pending the litigation.

In *Hains et al. v. Beach et al.*, 2d John. Ch. 459, it is laid down, as well settled, that "to a bill for foreclosure and sale of mortgaged premises, all incumbrances or persons having an interest *existing at the commencement* of the suit, subsequent as well as prior in date to the plaintiff's mortgage must be made parties, or otherwise they will not be bound by the decree."

It may safely be said that, except when changed by statute, this has been the rule from that day to the present. Nor is the essence of the rule changed by the code (sec. 411). "Persons having a prior lien" may be omitted; but in that case they are not bound by the decree. (3 John. Ch. 459; 6 Ib. 450.)

If, then, it be true that mortgagees, not made parties, are not bound by the decree so far as to be barred of their right to redeem, is there any established rule that places them on a different footing from a subsequent purchaser of the legal title, or circumscribes their rights, because of the foreclosure to which they are not made parties?

In *Vanderkemp et al. v. Shelton*, 11 Paige, 28, the question whether such junior mortgagee is driven to his bill to redeem was directly presented and was very fully examined, and chancellor Walworth was very clearly of opinion, that the right of the junior mortgagee, not made a party, could not be affected by a sale on foreclosure—that he was not required to file a bill to redeem—but that his proper remedy

was by foreclosure of his mortgage. It is there held that a purchase by the junior mortgagee on foreclosure of his mortgage did not impair the rights of the subsequent mortgagee not served.

In this case, when Stephens, the grantor of the defendant, Hawthorn, purchased under the decree in his favor, he only obtained by the purchase the interest which Shultz and wife then had in the premises. He obtained, it is true, the legal title, but it was the legal title subject to the plaintiff's mortgage.

It was formerly the doctrine that in such a case, his equitable title merged in the legal title upon his purchase, the effect of which would be to give the plaintiff's mortgage priority to the defendant's entire interest; and such would be the rule now if the subject were under consideration in a court of law.

But it has long been the practice in courts of equity to hold the legal and equitable title distinct, although both were vested in the same person, wherever it could be clearly gathered from all the proceedings that such was the intention of the holder when he acquired the legal title. And whenever the nature of the case shows that such severance of the legal and equitable titles is evidently to the interest of the holder, such intention will be presumed. (*Roberts ads. Jackson*, 1 Wend. 478; *James v. Morey*, 2 Cow. 246, 284, 300, *Gardner v. Aster*, 3 John. Ch. 53; *Cooper v. Whitney*, 3 Hill, 95.)

If these views are correct, the plaintiff has a lien upon the mortgaged premises for the principal of the note with interest at the rate specified from the date of the note.

A decree must be entered in his favor directing a sale of the premises. And the proceeds must be applied—

First—To the payment to defendant, Hawthorn, of the principal and interest on the \$400 note given to James B. Stephens;

Second—To the payment of principal and interest of the note held by the plaintiff; and,

Third—The residue paid to the defendant, Hawthorn.*

* This case having been taken to the supreme court on appeal from the whole of the decree, was tried *de novo* on the original evidence, at the term held September, 1869. The supreme court affirmed the decree of the circuit court. No written opinion having been filed in that court, the case does not appear in the published reports of its proceedings.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1869.

M. S. McCALL v. S. E. ELLIOTT.

BURDEN OF PROOF.—AGENT MUST DISCLOSE AGENCY.—If the defendant pleads that he made the contract as agent of another, and not as principal, and issue is joined, it devolves on the defendant to show that he so contracted, and that the plaintiff had notice of the agency.

The plaintiff sues for the value of work and labor done by him, as civil engineer.

The answer is to the effect that the work was done for the Oregon and California R. R. Co., and not for the defendant; and that the plaintiff agreed to do the labor for such instructions in the art as should be imparted to him in the course of the work.

The replication denies the allegations of the answer; and the cause was tried by jury.

The plaintiff proved that the work was worth \$50 per month.

The defendant proved that the citizens of Marysville, California, in the year 1863 raised money by subscription, and placed it in the hands of the defendant to meet the expenses of a preliminary survey of the route since known as the line of the Oregon and California Railway. That with a corps of engineers and assistants, of whom the plaintiff was one, the defendant surveyed the said line from Marysville to Oregon. That the plaintiff was then learning the business of a civil engineer. The evidence was conflicting as to whether the parties made a special agreement as to the mode of compensation, and as to whether it was understood by the plaintiff that all parties engaged in the work would rely upon subscriptions for compensation, or upon a company that was then being organized.

UPTON, J. instructed the jury that the burden of proof was on the defendant to show that he contracted as agent for others in employing the plaintiff, and that the plaintiff had notice of such agency; and that the plaintiff was entitled

to a verdict, unless the proof either showed such agency and such knowledge on the part of the plaintiff of the defendant's being agent, or established the making of the special contract as to the mode of compensation, which is set forth in the answer.

The plaintiff had a verdict.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1869.

LYMAN WILLIAMS v. EDGAR POPPLETON.

MALPRACTICE.—PLEADING.—In a civil action for alleged malpractice, when the character of the wound is stated in the answer, and the statement is not disputed by the replication, the plaintiff will not be permitted to prove that the wound was not of the character alleged in the answer.

EXPERTS.—TECHNICAL WORDS.—The opinion of an expert may be taken upon the meaning of technical words used in a pleading, but not on the construction of the pleading.

REPUTATION.—The defendant should not be allowed to prove what is his reputation for skill in his profession.

OPINION.—Nor is the opinion of another physician to be taken as to whether the defendant is a skillful surgeon, but the witness may state facts within his knowledge as to the defendant's skill.

RES GESTA.—A consultation held on occasion of the alleged improper treatment, is to be treated as a part of the *res gesta*, and may be given in evidence.

CONSULTATIONS.—Consultations on other occasions are not admissible.

SYSTEMS OF PRACTICE.—If the treatment is in accordance with a recognized system of surgery, it is not for the court or jury to undertake to determine whether that system is the best, nor to decide questions of surgical science upon which surgeons differ among themselves.

IDEM.—It is sufficient if the practitioner follow a known and recognized system.

JUDGMENT OF SURGEON.—When a skillful and careful surgeon exercises his best judgment in a case of doubt, he can not be held responsible for a want of success.

CONSIDERATION.—The release of a doubtful claim is a sufficient consideration to uphold a counter-release of a claim for damages.

IDEM.—Parol evidence may explain a writing as to the consideration expressed therein, and the actual consideration may be proved.

MISTAKE IN A RECEIPT.—When a settlement has taken place and written receipts have been given, if an item has been omitted by mistake, the mistake may be proved by parol; but if the item was thought of at the time by both parties, or by the party who objects to the settlement, a receipt in full must be held to include the item.

NEW TRIAL.—CONFLICTING EVIDENCE.—Where there was some evidence tending to show the damages to be the amount found, the court refused to set aside the verdict and grant a new trial.

VERDICT.—ACCEPTING JUROR.—Where both parties voluntarily accept a juror who declares that he has formed a decided opinion on the merits of the case, the party asking to set aside the verdict for insufficiency of evidence, should present a clear case.

RECEIPT, EXPLAINED BY PAROL.—Parol evidence of the surrounding circumstances is admissible to show that a particular cause of action is not included in a general receipt.

THIS is an action for malpractice. The complaint charged negligence and want of care and skill, on the part of the defendant as a physician and surgeon, in the treatment of the plaintiff, for an injury the plaintiff had received at his ankle joint. The plaintiff claimed \$20,000 damages.

The answer denied negligence, want of skill and care, and alleged that defendant treated the plaintiff for the alleged injury with care, skill and diligence.

The answer alleged that when the defendant undertook the treatment, the plaintiff was suffering from "an almost fatal injury; that plaintiff's leg had received a wound known in surgery as a compound, comminuted, complicated fracture of [at] the ankle joint, the joint being completely dislocated, the ligaments and tendons torn and separated, and the bone badly crushed, attended with all the secondary symptoms which usually result from such an injury." (a)

The answer also alleges that "on the twenty-fifth of February, 1869, said plaintiff and said defendant had a full adjustment and settlement of all claims and demands between them, and the said defendant then and there released to the said plaintiff all claims and demands, including a demand for professional services as physician and surgeon done and performed for plaintiff and his family before that time, and then justly due and owing from plaintiff to defendant, amounting to a large sum, to wit: \$200, for, and in full satisfaction and discharge of, all demands of the plaintiff

(a) This description of the injury is copied literally from a complaint sworn and filed by this plaintiff, Williams, in an action which he had previously brought against one East to recover damages for occasioning the fracture of his limb. It is, probably, for this reason that the replication is silent on the subject. The limb having been amputated above the knee, and the foot dissected, it is now said, that if there was any fracture it was but a slight comminution.

against the defendant, including all damages in the complaint mentioned, and which said release of this defendant, he, the said plaintiff, then and there accepted and received, of and from this defendant, in full satisfaction and discharge of all demand, against this defendant, including all damages in the complaint alleged, and thereupon released the same."

The replication denies all the defendant's allegations in regard to a settlement and release.

Caples & Moreland, for the plaintiff.

Mitchell, Dolph & Smith, for the defendant.

At the preceding term the jury failed to agree, and the case is now brought on for re-trial.

The evidence shows that plaintiff was injured at the ankle joint by being thrown from a wagon; and that the defendant and Dr. Chapman were called to the case soon after the injury, and after reducing the dislocation and adjusting the parts, the limb was dressed, being supported by roller bandages, with a splint at the bottom of the foot, and a splint adjusted to the inner side of the limb. The limb was then placed by the two surgeons in a fracture box extemporized for the occasion.

The two surgeons visited the patient on the following day, after which the defendant alone treated the case.

The defendant testified that at a visit made three days after the accident, he found that the limb was much swollen, with evident signs of threatened mortification over the internal *maliolis*, the feel being doughy and the limb in a state of extreme congestion. At this visit the defendant took off the splint, relieved the limb from pressure; and placed it upon a support, made by inverting an ordinary deal box about 20 x 10 x 7 inches in its dimensions. The upper surface of the inverted box being so cut as to form a hollow or groove, to receive the leg and permit the heel to rest without pressure; the bottom of the foot being supported against a board fastened to, and projecting above the box. There was much conflicting evidence as to the manner of fastening the piece of board to the box. Similar supports were sub-

stituted frequently during the treatment. The limb was eventually amputated above the knee after the defendant had ceased to treat the case. At the time of the amputation, which was some five or six months after the accident, the wound was not healed and the bones at the point of injury were in a diseased state. The foot had taken permanently, a prone position, and the *tibia* and *fibula* at their inferior extremities had become much diseased, affected with *cares*, and somewhat wasted.

The treatment most complained of, was the manner of supporting the limb. The propriety of removing the supports, and allowing the limb to be without splints or fracture-box, on the third day from the accident, was also attacked; but the course pursued on the third day was sustained, by the opinions of the surgeons who testified, as correct practice under the circumstances.

The defendant offered in evidence a receipt given him by the plaintiff, purporting to be in full of all demands.

In the course of the trial the following rulings were made and the rulings excepted to :

The plaintiff offered to prove that the wound was only a dislocation.

The defendant objected that the character of the wound is admitted by the pleadings, and that at least a compound fracture is admitted.

The objection was sustained.

The plaintiff asked a medical expert : "Is there any such thing known in surgery as a fracture of an ankle joint?"

The defendant objected that, if this is more than verbal criticism, the question calls for the opinion of the witness upon the construction of the pleadings. The objection was sustained.

The plaintiff also asked : "Is there any such injury known in surgery as that described in the answer?"

The defendant objected as before, and on the ground that the replication admits that the injury in this case is the same that is described in the answer.

Held: That, although it is competent to take the opinion of experts upon the meaning of any of the technical terms

used in the pleadings, for the information of the court, yet the question in its present form is inadmissible.

A medical witness stated that he had been acquainted with defendant and with his practice as a surgeon for several years. He was asked by the defendant: "What is defendant's reputation for skill in his profession?" This was objected to as incompetent, and the objection was sustained.

The defendant asked: "What do you know of your own knowledge of his skill?"

The plaintiff objected, that the question calls for the opinion of the witness on facts that are not disclosed to the jury. The court admitted the question, but informed the witness that he was not to state, in reply, matters of opinion.

The witness testified that he had been associated with defendant in difficult surgical cases; and he was asked by the defendant to state any facts within his knowledge going to show whether or not defendant was a skillful surgeon.

The same objection was made and overruled; and the witness described several surgical cases in which he had seen the defendant operate, and testified that the defendant performed each of the operations skillfully.

The defendant being a witness, his counsel asked: "When you and Dr. Chapman made your first visit and were in consultation upon the case, what was said or advised by yourself and Dr. Chapman in the course of the consultation in regard to the proper mode of treating the case?"

The plaintiff objected to the question as irrelevant and incompetent.

By the court: "If the plaintiff claims that the treatment on that occasion was improper, I think the consultation may be treated as of the *res gesta*, and what was advised may be given in evidence."

The plaintiff disclaimed objection to the treatment on that occasion, and the objection was sustained. (b)

(b) The evidence is too voluminous to be inserted. Many medical witnesses were examined at length, upon modes of treatment, causes of *anchilosis* and on other subjects, and there was much conflicting testimony of other witnesses as to the mode of supporting the limb resorted to. The dissected bones of the amputated limb had been exhibited to the jury on the former trial, and had been examined by some of the experts before testifying, but the bones were not exhibited to the jury at the present trial.

UPTON, J. instructed the jury as follows:

Gentlemen of the Jury: In this case I am required to reduce the charge to writing, and will proceed to read to you such instructions as to the law, as seem necessary to a proper determination of the case.

It is a rule of law that any material fact stated in the complaint and not denied in the answer is admitted by the defendant, and any such fact stated in the answer and not denied by the replication is admitted by the plaintiff to be true. In regard to facts so admitted in the pleadings, neither party is at liberty on the trial to gainsay or contradict.

It is the duty of the court in this, as in all cases, to construe the pleadings and to determine what the issues are, or in other words, what is admitted and what is in dispute between the parties.

In this case what is said about the name, nature and character of the injury is not denied, and is therefore to be taken as true. It is, consequently, admitted in this case, both by the plaintiff and defendant, that the injury which the defendant was called upon to treat was of the kind which the answer declares it to be.

It is important that you understand clearly what is complained of by the plaintiff, and what is set up as a defense, in order that you may confine your deliberations to the points involved, and apply the evidence to questions that are in controversy.

The plaintiff complains that the defendant failed to treat the plaintiff in a skillful and proper manner for the injuries he had received; that the defendant, through ignorance or neglect, failed to furnish proper support to the foot of plaintiff, so that the bones of the ankle and leg could or would unite, and that the defendant improperly removed the support that had been placed under, and to, plaintiff's foot to keep the same in position.

The defendant, by his answer, denies the alleged neglect, sets up a description of the injury, avers that he treated the case with care and skill, and as an additional defense sets up that he has been released.

It is important to ascertain and have in mind correct rules in regard to the duties and obligations of surgeons when employed professionally.

In cases like this the court and jury do not undertake to determine what is the best mode of treatment, or to decide questions of medical science upon which surgeons differ among themselves.

If the treatment is according to a recognized system of surgery, it is not for the court or jury to undertake to determine whether that system is the best among the many that may be adopted by different branches of the medical profession. It is sufficient if the practitioner follow any of the known and recognized systems.

A physician or surgeon is never considered to have warranted a cure unless it is expressly proved that he contracted to warrant a cure.

And he cannot be held responsible for mere want of success. There must also be a want of ordinary care, or of ordinary skill, or a failure to exercise his best judgment.

By ordinary skill is meant such skill as men in the same profession usually possess. It would be contrary to reason to hold that every professional man is bound to possess remarkable or unusual talent. In order to hold the defendant liable in damages it must be satisfactorily shown by the evidence, not only that he failed to treat the case properly, but also that the damage which the plaintiff complains of is attributable either to unskillful or negligent treatment.

The learned professions, like other avocations, are open to every person who sees proper to prepare himself to pursue them as an avocation.

When a young man sees fit to enter his name as a student of medicine and surgery, there is no rule requiring that he should be possessed of uncommon talent. It is a profession upon which every youth of common ability may enter as a student with a view to make it the business of his life, and it is not the intention of the law, nor would it be consistent with human reason to require that every aspirant for professional honors should bring to the labor remarkable and

uncommon natural aptitude. The education and choice of profession or occupation of most individuals is to a great extent influenced and directed by parents or others who have their care in childhood, and make the choice or give the impressions and bias that lead to the particular trade or profession before the individual arrives at years of discretion. This choice is often made at too early an age to enable any one to determine whether or not the individual possesses great natural talent or great aptitude to that particular calling. But the law which opens every trade and profession to each one of us, is intended for the protection of all.

It would be equally unjust, and contrary of human reason, to require of every physician extraordinary talent and extraordinary natural ability and judgment, as it would to refuse to call the physician to an account who neglected to treat a case with that care men ordinarily bestow in the business of life, and according to the best judgment his Creator has given him. The law does not go to either extreme. The law is intended for the protection of all, both physician and the patient.

The faithful, honest and conscientious physician is called upon to administer to every kind and class of men, the high and low, the rich and the poor, the virtuous and the depraved. Common humanity demands that the sick and distressed should be administered to, whatever may be their circumstances. The physician is obliged by his calling, constantly to enter the abodes of others, and frequently to undertake difficult cases and to perform critical operations in the presence of those who are ignorant and credulous.

He is liable to have his acts misjudged, his motives suspected and the truth colored or distorted even where there are no dishonest intentions on the part of his accusers. And from the very nature of his duty, he is constantly liable to be called upon to perform the most critical operations in the presence of persons united in interest and sympathy by the ties of family, where he may be the only witness in his own behalf.

It is the intention of the law to protect the physician or surgeon as well as the patient, and to protect the patient as well as the physician or surgeon. If the surgeon is grossly ignorant of his profession, or knowing his duty, grossly neglects it, he should be held to the full rigor of the law and should suffer the full consequences of imposing himself upon a confiding public. His trust and responsibilities are of the highest and gravest character, and he is bound to a faithful discharge of the trust. In case of doubt he is bound to use the best of his judgment, but the surgeon is not responsible for an error of judgment when the expediency of the remedy or operation is involved in doubt, if he acts with ordinary care, skill and diligence.

A fracture or dislocation, or both combined, may be so complicated that no human skill can restore it. Or the patient may, by disregarding the surgeon's directions, impair the effect of the best conceived measures. The surgeon does not deal with inanimate or insensate matter like the stone mason or brick layer, who can choose his materials and adjust them according to mathematical lines, but he has a suffering human being to treat, a nervous system to tranquilize, and an excited will to regulate and control; where a surgeon undertakes to treat a fractured limb, he has not only to apply the known facts and theoretical knowledge of his science, but he may have to contend with very many powerful and hidden influences; such as want of vital force, habit of life, hereditary disease, the state of the climate. These or the mental state of his patient may often render the management of a surgical case difficult, doubtful and dangerous; and may have greater influence in the result than all the surgeon may be able to accomplish, even with the best skill and care.

From these and like considerations arise those cases and conditions so frequently alluded to by medical witnesses in the course of this trial, in which the surgeon is called upon to exercise his best judgment, and in which he is justified in changing the mode of treatment from time to time as the nature and exigencies of the case shall indicate a necessity, or the propriety of a change.

This is not, as was ingeniously said in the course of the argument, establishing a rule "that every surgeon must be the judge in his own particular case," but it is applying a necessary and well established rule, that in cases of doubt as to what is the best course to be pursued, it is the duty of the surgeon to exercise his best judgment.

And it follows as a consequence of this duty, that when the skillful and careful surgeon does exercise his best judgment in a case of doubt, he ought not to be and cannot be, held responsible for a failure of success.

The fact that medical cases arise in which the practitioner is compelled to rely on his own judgment, makes such a rule necessary.

If he is qualified to act and is faithful to the great trusts confided to him, he deserves the full protection the rules of law afford him.

On the other hand, if he is grossly ignorant, or fails to use ordinary care in the treatment of the case he has in charge, it is most just that he should suffer the consequence of his acts.

Applying these principles, therefore, to this case, you will inquire:

1st. Did the defendant possess ordinary skill and treat the injury of the plaintiff with reasonable and ordinary diligence and care? If he did, and if in case of doubt he used his best judgment, he is not liable, and your verdict should be for the defendant.

If you believe from the evidence that the defendant did not treat the plaintiff's limb with reasonable and ordinary diligence and skill, and with reasonable and ordinary care, then he is liable for all damages necessarily resulting from such improper treatment.

If you believe from the evidence that whatever injury the plaintiff has sustained has been the result of the severe injury originally received, and not the result of negligent, unskillful or improper treatment, then your verdict should be for the defendant.

Another branch of this case is presented by the pleadings and evidence, namely—an alleged settlement and release or receipt.

Where two parties have mutual unsettled dealings, or are asserting and in good faith making claim to debts or demands, each against the other, and they each execute to the other a release or a receipt in full, the execution of such release or receipt on the part of one is a sufficient consideration to uphold the release or receipt on the part of the other. Surrendering a claim which is asserted in good faith against the other, and which the other is in some risk of having to pay, is a sufficient consideration; and it is not necessary to prove that it could have been successfully prosecuted. In this case, if the parties agreed to a full settlement of all their claims, a release by one was a sufficient consideration for a release by the other.

A written receipt is sometimes open to explanation by parol evidence.

When parties make what they intend for a final settlement, it sometimes happens that an item of account is omitted by both parties by mistake, so that although both parties intended to include their entire dealings, and believed they had done so, yet there is an item that was not in fact settled. It is permissible, notwithstanding the language of the receipts, in a proper case, to show the mistake. But if it is true that both parties thought of the item which is said to be omitted, it was the duty of him who claims that there is a mistake, to have attended to the matter at the time; and if he did not it is his own fault, and he cannot introduce parol evidence to vary the import of the language of the receipt.

Parol evidence is also admissible to show that there was no consideration, or to show that the consideration mentioned in the receipt is not the true one, and that the parties acted upon other or different consideration from that mentioned in the receipt, when that question is material. But in this case if there was any consideration for the receipt it is not material whether it was great or small.

There can be no such thing allowed and considered by you as a condition of the receipt or release, thought of and agreed to at the time, but not expressed in the writing.

That is, the writing must be taken as containing the very

words the parties intend to use to express what was agreed to at the time, and all the conditions of the agreement.

Fraud will not be presumed, but must be established by proof. The burden of proof is on the plaintiff to establish fraud. If it has been proved that the defendant practiced deception upon the plaintiff and by that means obtained the receipt, the receipt is of no value. Such fraudulent practice must be proved by satisfactory evidence. The receipt cannot be avoided on the ground that Dr. Poppleton apprehended danger of an action. He was not bound to state that he feared an action. It would be no fraud or deception for him to remain silent as to his reasons for wanting the receipt. If the jury believe that the receipt was fairly or honestly obtained, and Williams, the plaintiff, suspected, when asked for the receipt, that defendant (Poppleton) feared an action for malpractice, and desired the receipt on that account, that of itself is decisive of the case.

If you find that such was the case, then the transaction at the time of executing the receipts was a full and final settlement of all that is involved in this action.

You are to decide upon every question of fact involved in the case, and upon every question you should be governed by the evidence that has been given on the trial.

The jury returned a verdict of \$900 for plaintiff.

After the verdict was rendered in this cause, the defendant filed a motion for a new trial, which, being argued and submitted, was taken under advisement. The following opinion was filed:

UPTON, J. The plaintiff having recovered a verdict for \$900, the defendant moved for a *new trial*, assigning insufficiency of the evidence; that the verdict is against law; and errors of law, committed on the trial. Although the verdict was probably the result of compromise of conflicting opinions in the jury room, and the amount is inconsiderable compared with the amount claimed, I think there was some evidence

tending to sustain the finding of this amount.(c) I am less inclined to review the facts, because both parties voluntarily accepted a juror after he had declared that he had formed an opinion on the merits of the case. I consider such practice open to criticism; and I think after a party has voluntarily submitted his case upon the chance or probability of such juror's being for him, he should present a very clear case, if he asks relief on the ground of insufficiency of the evidence.

* One of the errors of law assigned, refers to the proceedings relating to the written release or receipt. On the trial the defendant produced in evidence his own receipt in full of all demands, and a receipt of the same date signed by the plaintiff, as follows:

"Received February 25th, 1869, payment in full for Dr. Edgar Poppleton, and settlement is hereby acknowledged, and that said Poppleton has fully paid me all dues and demands that I have against him of whatsoever nature or kind to date, the payment being two hundred dollars:

LYMAN WILLIAMS."

The court permitted the plaintiff to offer evidence that the defendant had admitted that this cause of action was not mentioned on occasion of executing the receipts. And the plaintiff being a witness, his counsel asked him to state the circumstances under which the receipt was given, claiming the answer for the purpose of showing, both that the subject matter of this action was not included in the settlement then made, and that the plaintiff was misled by the defendant. The defendant objected, that a receipt can not be disputed by parol except as to the consideration or amount received; that fraud or mistake should be plead; and that the language of the instrument being clear and explicit, and its construction not doubtful, proof of surrounding circumstances was not admissible to vary or change its meaning.

(c) The defendant treated the limb during some months, and it was not amputated until after he ceased to treat the case. Some of the testimony of experts tended to show that amputation should have been resorted to a considerable time before the defendant ceased to treat the case. If the plaintiff's sufferings were improperly and unnecessarily prolonged, the \$900 may have been a reasonable compensation.

The objection was overruled, and the plaintiff testified in substance that the subject of this action had never previously been mentioned between the parties; that the defendant was excited when he came; that he proposed to remit his claim of about \$300 for medical attendance, because the plaintiff was poor, leaving it optional with the plaintiff to pay him \$100 at some future time, if the plaintiff should become able. The plaintiff said he thought at the time it was probable that the defendant was doing this from fear of being sued for malpractice; but nothing was said on the subject; that the whole matter was done hastily; that it was directly after the verdict in the case of *Williams v. East*, in which case the defendant's mode of treating plaintiff's case was first criticised.

On the trial I was not entirely confident of the admissibility of this evidence under the pleadings.

Had the answer specifically alleged, that the plaintiff had for a valuable consideration executed a release of this cause of action, and had the replication merely denied the execution of such a release, making no allegations of fraud or mistake, I should unhesitatingly have ruled out all evidence tending to show misrepresentation, imposition or mistake. But these pleadings, when divested of surplusage, amount to this; the defendant asserts that the parties have made a settlement which includes this alleged cause of action; and the plaintiff denies having settled this subject matter. A receipt or release is produced which does not specifically mention this subject. I am not prepared to say the plaintiff was called upon to reply more specially or specifically than he has. Nor to hold that he is not entitled, under his denials, to show by parol, if he can, that the writing was not intended to include this subject matter, by showing the circumstances under which it was made. And if those circumstances indicate that he was deceived or mistook the nature of the transaction, I think he was authorized to lay them before the jury, to enable them to judge whether he voluntarily assented to a release of the subject matter of this action. The plaintiff undoubtedly had a right to show

the surrounding circumstances, to rebut the conclusion that this claim was included in the release.(d)

And it is difficult, if not impossible, to separate the circumstances that would tend to show that he did not voluntarily assent to release this claim, from those that might show that he was unduly influenced or deceived.

Exceptions were taken by the plaintiff to some of the rulings on the admissibility of testimony; but the only exceptions that are urged upon the argument, are those taken to the rulings which excluded the evidence of other surgeons, as to the reputation of the defendant, and refused to permit them to pronounce upon the question whether the defendant is a skillful surgeon.

Upon more mature consideration, I am satisfied of the correctness of these rulings.

Although in form, the latter question purported to ask witness what he *knew of his own knowledge* of the skill of the defendant, it in reality asked for the opinion of the witness. It virtually puts the witness in the place of the jury, so far as to call upon him to pass upon the facts that have come under his observation, and having drawn from his own observations, conclusions of fact, it asks him to express the opinion which he predicates upon those facts. The witness was certainly permitted to go as far in this direction as the rules of evidence can tolerate. And when, after detailing cases in which he had seen the defendant operate, he was permitted, without objection, to express his opinion as to whether the operations were skillfully performed, I think as much latitude was given as can be permitted in such cases.

The motion for a new trial must be denied.

(d) 2 Metc. 288; 5 Gill. 437.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1869.

JACOB DAVIS v. JOHN MASON.

GOLD COIN.—Where the plaintiff sues for gold coin loaned to the amount of \$80, he will not be entitled to recover a judgment for \$114, on the ground that the coin was worth that sum in currency.*

IDEM.—In such case, evidence of the relative value of coin and legal tender notes is not admissible.

CUSTOM.—Nor evidence of the custom of a particular bank to pay coin on checks that do not reduce the kind of currency, or of the customs of other banks in the place in this respect.

EXPRESS CONTRACT.—Where the pleadings admit an agreed price for labor, evidence of its reasonable value is not admissible.

EXPRESS AND IMPLIED CONTRACTS.—Where the parties have agreed orally that the wages shall be at a fixed rate in gold coin, but have failed to reduce the agreement to writing, it is held not to amount to a specific agreement, and evidence of the reasonable value is admissible, under proper pleadings.

THE plaintiff declared for the reasonable value of his services from July 1, 1868, to July 1, 1869; and for \$80 gold coin loaned, which he alleged to be of the value of \$114 in legal tender notes.

The answer sets up a special contract that the defendant would perform the labor at \$60 per month; alleges payment, to an amount specified; and denies that the defendant borrowed any money from the plaintiff.

The replication denies making the special contract, and avers that no price was ever agreed to or bargained, except that the parties agreed that the labor should be paid in gold coin and should be at the rate of \$60 per month up to January 1, 1869, and from that time \$70 per month.

In opening the case to the jury, the plaintiff's counsel claimed the reasonable value of the labor estimated in legal tender notes. A question was raised whether he had not admitted a specially agreed value. The plaintiff obtained leave, and amended his replication, so as to assert that all that was ever assented to in regard to the wages was assented to orally, and not reduced to writing, and that one

* The question was not raised whether the plaintiff could recover a judgment for gold coin, the only writing being a check drawn on a third party by the plaintiff, which did not mention the kind of currency.

of the terms of the agreement was that the wages should be paid in gold coin.

One or more of the plaintiffs' witnesses testified that the labor was reasonably worth \$109 per month. The plaintiff offered to prove that the \$80 loaned was worth \$114 in currency. This was objected to as irrelevant and incompetent, and the objection was sustained. The plaintiff testified that in loaning the \$80 he gave the defendant a check on his banker, which check did not specify the kind of currency. The plaintiff then offered to prove that it was the custom of that bank to pay gold coin on all checks that did not specify the kind of currency, and that such was the custom of all bankers in the same city. This evidence was objected to by the defendant as irrelevant and incompetent, and the objection was sustained.

UPTON, J. instructed as follows :

The plaintiff sues to recover \$80, which he alleges he loaned to the defendant, and also for the reasonable value of his services.

Where the parties agree upon and contract for a stipulated value or rate of wages, the plaintiff can recover no more than the amount agreed upon. But where the parties have not determined the rate by their own agreement, the party performing labor at the request of the other is entitled to recover the reasonable value of his services.

To constitute an express contract fixing the rate of wages, there must be the assent of two minds to one and the same proposition, and the contract must be such as can be enforced.

If these parties assented that the wages should be a certain amount of gold coin, and if its payment in gold was a material condition or term of the agreement, it was a contract that could not be fully entered into so as to make all its terms binding upon the parties without a writing. The parties cannot be considered as having made such a contract, unless some writing was made.

If no writing was made, the parties did not make a valid contract that the payment should be made in gold coin. If

payment in gold coin was one condition, and the rate of wages another condition, or term, that both parties intended should be part of the contract, it evidently was not agreed that such rate of wages was satisfactory if paid in something of less value than gold coin.

In that case, there was not a binding contract for the payment of gold coin; because for the want of a writing such contract cannot be enforced, and it was not a binding contract for that rate of wages payable in something of less value, because the minds of the two contracting parties never assented to that proposition. Unless there has been an assent of both parties, to a definite mode and measure of compensation, which can be enforced both as to the amount and the value they had in contemplation, they have not by their own act fixed upon the rate of wages, and the law determines it for them. In such case the law declares the compensation to be what the services are reasonably worth. If the plaintiff recovers a judgment for wages in this case, the defendant will be authorized to pay it, if he chooses to do so, in legal tender notes, and it is proper that the jury should estimate the wages in view of that fact, when estimates are made in different kinds of currency by different witnesses.

As to the alleged loan of money, there is no rule of law that will authorize the jury to render a verdict for a greater amount than was loaned, merely because the judgment can be paid in a currency of less value. This may appear to be a hardship in some cases, and it is impossible to institute a system of laws that will never work hardships. When one so far trusts to others as to contract for gold coin, and take no written agreement for its payment, he must suffer the consequence of his neglect, if results do not come up to his expectations.

Jurors are not at liberty to disregard the law in such cases, upon an idea that they can thus do justice between the parties. If courts or juries are at liberty to disregard the law in some cases, what is to prevent them from doing so in all cases, when they do not approve of the law. It is evident that such practice would undermine the foundation

of remedial justice, and would be substituting the arbitrary will of those who are called upon to administer justice, for the settled rules of law upon which every citizen has a right to rely for the protection, not only of his property, but his liberty and his life. It is better that we should sometimes suffer great hardship, whether caused by our own neglect or otherwise, than that we should exchange known rules of law for the arbitrary will of those who undertake to administer the law.

The plaintiff had a verdict, and judgment was entered without specifying the kind of currency.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1869.

STATE OF OREGON *v.* JOHN LEONARD.

CONTINUANCE.—Where it was not satisfactorily shown that there was a reasonable expectation of procuring the evidence at another term, a continuance was denied.

IDEM.—Where the witness has no fixed residence, a clear showing should be made of the circumstances tending to prove the probability of obtaining his evidence.

ADMISSIONS.—Where admissions were made to the arresting officer, and it also appears that the officer advised the defendant to make a confession, but it did not appear whether the admission was made before or after the advice was given, and the defendant's attorney neglected to question the witness on that subject, the court refused to charge the jury that they should disregard the evidence of the admissions.

AFTER the grand jury of the present term had been discharged, the district attorney presented the papers that had been certified by the committing magistrate in this case, and on his motion, the persons who had composed the grand jury were resummoned, in pursuance of section 32 of the criminal code.

The same foreman was reappointed, and the grand jury was again sworn; and afterwards presented a bill of indictment charging the defendant with larceny, in stealing twenty-eight ounces of gold dust, the property of one Morris.

A. C. Gibbs, district attorney, and *Charles Parrish*, for the state.

Julius Moreland and *R. E. Bybee*, under appointment of the court, appeared for the defendant.

The defendant pleaded not guilty, and filed a motion and his affidavit for a continuance.

The affidavit stated that the gold dust was the defendant's property. That defendant and Morris had traveled together from Mazoula, some hundreds of miles, to Portland, the gold dust being brought in the canteenas or saddle-bags of Morris. That owing to Morris being familiar with the route, and with traveling, the defendant had requested Morris to take the gold dust and carry it for the defendant. That the absent witness would testify to those facts; that said witness was present at Mazoula, and saw the gold dust delivered by the defendant to said Morris. That at the time of that transaction, the witness left Mazoula to go to a designated town in Montana, with the intention of returning from there to Portland; and that he had business engagements with the defendant, to meet the defendant at this place in a few weeks, and to go from this place to Ohio in company with the defendant, on business of theirs. That the defendant knew of no other witness to the fact of the delivery or of the ownership of the gold dust. That the motion was not made for delay; and that the defendant would be able to produce the attendance of said witness at the next term of the court.

UPTON, J. It is not satisfactorily shown that there is a reasonable expectation of procuring the attendance of the witness at another term. The residence of the witness is not stated, nor is the nature of the business which may bring him to this place disclosed. Taking the affidavit to be true, if he then actually intended to come to this place, because of business relations with the defendant, there is no certainty that he will now have the same inducements to come. At that time the defendant had twenty-eight ounces of gold dust, if his affidavit is true; now he has no certainty of having anything to embark in that business. There is no certainty that the witness, if he should come, would be willing to be detained here until the next term, or that he would

let his presence be known, and there is not much difficulty in his avoiding risk of such detention, if he chooses to do so. Where the witness has no fixed residence, a clear showing should be made of the circumstances tending to prove the probability of obtaining his evidence.

The case being brought on for trial.

Philip Saunders, City Marshal, one of the witnesses, on behalf of the State, testified: "After hearing of the affair, about nine A. M., I went aboard the *Cascades* boat at Couches' wharf. I remained on the gangway until the passengers got off, and then went aft. A person on board pointed to a room where the boat hands sleep, and on entering the room I found the defendant in that room, lying on a bunk. I searched him and found this purse on him. I asked the defendant why he took it. He said he could not say what did possess him to take it. That he was sorry he took it. That Morris was a kind of loose man in his business. That Morris could spare it and not feel it. That he had never done such a thing before."

On Cross-examination the witness said: "I told him it would be better for him to make a clean breast of it, and throw himself on the mercy of the court."*

The defendant's counsel requested the court to charge the jury that it was their duty to disregard all evidence of admissions made by the defendant to Marshal Saunders. And the judge refused to give the instruction; the defendant's counsel having seen proper not to question the witness as to whether the admissions were made before or after the advice was given.

The defendant was convicted.

* Marshal Saunders was not questioned as to whether any, or how much, of the confession was made after the witness gave the advice.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1869.

J. A. CARR, RESPONDENT, v. MOSES HURD, APPELLANT.

SERVICE OF NOTICE OF APPEAL.—Notice of an appeal from a judgment rendered by a justice of the peace, may be served either upon the party personally or on the attorney who appeared for him in the action, if such attorney resides in the county where the trial was had.

THE respondent appeared specially for the purpose, and moved to dismiss the appeal for want of a sufficient service of notice of the appeal. The respondent had appeared in the justice's court by an attorney who resides and has his office in the county, and the notice of appeal was served on the attorney and not on the respondent in person.

Hill & Mulky, for the respondent, cite *Daily v. Bergman*, decided in this court in 1866. 6 How. Pr. 106. 6 Cal. 245.

O. P. Mason, for appellant, cites *Lindley v. Wallis*, 2 Ogn. 203.

UPTON, J. The general practice act, sec. 527, provides, in regard to appeals from judgments rendered in courts of record, "The appellant shall cause a notice to be served on the adverse party, and file the original," etc. The justices' act uses this phraseology: "The appeal is taken by serving a notice thereof on the adverse party and filing the original." Code p. 595, s. 66.

In *Lindley v. Wallis*, 2 Ogn. 203, the supreme court having an appeal from a court of record under consideration, held that, "the service of notice of appeal may be made either upon the party or upon his attorney of record residing within the county where the trial was had. Outside the county the service can only be had on the party." It only remains to be determined whether there are sound reasons for sustaining a different rule, in appeals from a court not of record. There is force in the position that such courts have no attorneys of record, or rather that any person may appear there as attorney. There are not the same safeguards against misapprehension or negligence on the part of persons who appear there as attorneys, as there are in courts of record; and the former ruling of this court, if not in conflict with the opinion of

3	160
20	128
35*	381

3	160
126	446
38*	622
3	160
28	442

the supreme court, should be of great weight in determining the case. It should be borne in mind, however, that that ruling was made before the question had been determined in the supreme court, and at a time when the bar was much divided in opinion as to what ought to be the rule in appeals from courts of record. I am inclined to think my predecessor would have ruled differently if the ruling in *Lindley v. Wallis* had been announced before he was called to pass upon this question. A very grave reason against the ruling made in *Daily v. Bergman* is, that a plaintiff may sue by attorney in a justice's court and obtain judgment, without ever coming into the state. In that case, all right of appeal would be cut off, unless notice of appeal can be served on the attorney. I think the reasons in favor of service on the attorney stronger than those against it, and that the practice, in appeals from justices' courts, should conform in this particular with the practice in other cases, as established by the supreme court in *Lindley v. Wallis*.¹

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1869.

THE OREGON CENTRAL R. R. CO., RESPONDENT, v. W. T. SCOGGIN, APPELLANT.

PLFA IN ABATEMENT.—When an answer sets up a defense in bar, and also denies "that the plaintiff is a corporation duly organized," the denial will be stricken out as within the rule established in *Hopwood v. Patterson* (2 Ogn. 49).

PLEADING.—It does not raise an issue of fact to say the plaintiff is not *duly* organized.

CORPORATION.—A corporation may receive subscriptions of its stock, and may sue before being fully organized.

FRAUD.—To avoid a contract on the ground of fraudulent misrepresentations it must appear that the party acted on the representations; and that the misrepresentations were concerning matters of fact and not matters of opinion or of law.

AMENDMENT.—Where matters in abatement were plead at the same time with a defense in bar, leave to amend as to the matters in abatement was denied.

1. The ruling in the case of *Lindley v. Wallis* is understood to require service to be made on the party, when the attorney resides outside the county.

THIS action was commenced in justice's court to recover \$188 alleged to be due on a subscription for ten shares of the plaintiff's corporate stock at \$25 per share.

The plaintiff had judgment, and the defendant appeals to this court.

The case is now presented on motion to strike out parts of the answer.

1. The answer "denies that plaintiff is a corporation duly organized."

2. Denies that the defendant agreed to take the ten shares.

3. Alleges that the plaintiff's capital stock is fixed at \$5,000,000, and that one half thereof has not been subscribed.

4. That the defendant did subscribe a writing wherein it was agreed that in consideration the plaintiff was donee of certain "government aid" of the value of seventy-five per cent. of the cost of constructing the road, or \$75 per share of the stock, the defendant would take and pay for ten shares (nominally \$100 each) at \$25 per share. But that in truth the plaintiff was not such donee, and said consideration has wholly failed.

5. That the agent of the plaintiff, acting for the plaintiff in procuring said subscription, made false representations that are set forth in the answer.

6. The answer states what is the construction of certain language used in the written contract, and alleges that the defendant has paid \$62 on the subscription, and that the \$62 was obtained by the same fraud before alleged.

The plaintiff moves to strike from the answer each of the several defenses above numbered.

THE COURT (UPTON J.) announced the decision as follows:

The denial that plaintiff "is a corporation *duly organized*" should be stricken out. Although such denial is sometimes treated as a plea in bar in particular cases, ordinarily it does not involve the merits of the action, and is within the rule established in *Hopwood v. Patterson* (2 Ogn. 49). In this case, however, it is subject to the further objection that it is not necessary that the plaintiff should be both

incorporated and organized, to enable it to receive subscriptions and to sue. Nor is it a sufficient denial to say the plaintiff is not duly organized. It does not raise an issue of fact.

The denial that defendant agreed to take ten shares, referred to in the second part of the motion, is admitted to be predicated on the disability of the plaintiff to make the contract. The motion raises these two questions: Can a corporation make and collect assessments before its organization is fully perfected by the election of officers, and in other respects? And can one who has contracted with the company as a corporation, question the regularity of its organization for the purpose of avoiding the contract?

The language of section 5 of the general law, if not controlled by other provisions, is broad enough to authorize assessments and collections before the election of officers. The corporators "may sue and be sued," purchase property, appoint agents, "make by-laws" * * * "for the sale of any portion of its stocks for delinquent assessments due thereon."

By section 6 the corporators must have power to receive subscriptions before proceeding to organize by electing officers, and, as a necessary consequence, may do anything requisite and proper to be done in obtaining subscriptions.

If the corporators are empowered to contract in relation to subscriptions, to make rules for sales of delinquent assessments, and to sue and be sued, it seems to be immaterial for the purposes of this case, whether the corporation is organized or not.

That one who subscribes to the stock can avoid the subscription, because of neglect to organize, is certainly a position difficult to sustain, and it is questionable whether the neglect can be set up, except by a proceeding in the nature of *quo warranto*, under section 353 of the code. This part of the motion should be allowed.

The fourth point in the motion is directed to the alleged failure of consideration. This part of the motion should be denied.

The fifth and sixth specifications of the motion are

directed to alleged misrepresentations. These parts of the motion should be sustained. The answer does not show that the defendant was misled by the misrepresentations; and the false representations are not confined to matters of fact, but include conclusions and matters of opinion.

The parts of the motion numbered one, two, three, five and six should be granted, but the motion should be overruled as to its fourth subdivision, relating to failure of consideration.

The defendant asked leave to amend his answer, and leave was granted as to parts five and six, above specified, but denied as to specifications one, two and three.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1869.

THE OREGON CASCADE R. R. CO. v. JOSEPH BAILY,
DEFENDANT, AND THE OREGON STEAM NAVIGATION
CO., INTERVENOR.

PLEAS IN ABATEMENT AND IN BAR.—JOINDER.—In an action to appropriate land to the use of a railroad corporation, the defendant will not be allowed to unite the several defenses in one trial, that the company is not incorporated, the land is not subject to appropriation, and its value is \$200,000.

IDEM.—CONSENT.—The parties may consent to try the two latter issues together.

VIEW.—Duties of jurors in viewing premises, stated.

ACTION TO CONDEMN LAND FOR A RAILROAD.—Where the plaintiff sues to condemn sixty feet in width, he will not be allowed to give evidence of the value of, and ask a verdict for the condemnation of forty-five feet in width.

PAROL.—Parol evidence of a written statement of value furnished the assessor is not admissible.

ADMISSIONS.—Nor is the assessment roll admissible to prove the value of the land, or to prove at what sum the owner valued it.

EVIDENCE.—The plaintiff was not permitted to go into a general exhibit of the defendant's corporate transactions and rates of charge, to show that the defendant was claiming the land solely for the purpose of monopoly or to prevent competition.

ARTICLES OF INCORPORATION.—The evidence of the powers of a corporation is now to be found in the general law and its articles of incorporation, as formerly this was contained in the charter.

THE CONDEMNATION IS TO A PUBLIC USE.—When private property is condemned to the use of a corporation, it is condemned to a public use. It is because the corporation is to be a public agent that the legislature has power to authorize the condemnation. If the government authorizes the taking of private property for any use but a public one, the act is void.

PURCHASE.—A corporation has no higher or better right to property condemned by the judgment of a court, than to that acquired by purchase without condemnation.

LIABILITY OF CORPORATION'S PROPERTY TO CONDEMNATION.—In general, property held by a corporation and necessary to the public use for which the corporation is created, is not liable to be condemned and appropriated to another corporation for the same use.

ARTICLES OF INCORPORATION, CONSTRUCTION OF.—A company incorporated to transport freight and passengers on a river and its portages, is not necessarily limited to one side of the river at a portage.

RIGHT OF WAY.—A corporation has no right to the exclusive use of a right of way that is not necessary and useful in its corporate business.

IDEM.—If the defendant has voluntarily abandoned the use of the land in question as a part of its line of transportation, the land is liable to be condemned.

IDEM.—The question of forfeiture cannot be tried in a proceeding to condemn land.

THIS is an action to condemn and appropriate lands to the use of a railroad company.

The complaint states that the plaintiff is duly incorporated "for the purpose of locating, building, constructing, stocking and using a railroad" from a certain designated point (at the foot of "The Cascades"), to another point (at the head of "The Cascades"); and "for that purpose the plaintiff needs the right of way over certain lands, part of which lie in Multnomah County, Oregon, and a part thereof in Wasco County, Oregon." That the defendant (Joseph Baily) is in the possession of the whole of the said lands; "which lands it herein asks to have appropriated to its use." The description of the lands needed by the plaintiff being as follows, to wit: "Sixty feet in width along the whole length of the following described line; that is to say, twelve feet of said sixty, lying immediately on the northerly side of said line, and forty-eight feet lying immediately on the southerly side of said line." The line is described by courses and distances. The quantity of land within the sixty feet is stated at $32\frac{42}{100}$ acres.

The plaintiff states that it is "unable to agree with the owners of said land as to the compensation to be paid therefor."

The defendant, Joseph Baily, answers traversing the allegations of the complaint, by stating want of knowledge or information, and pleads that the lands are the property of The Oregon Steam Navigation Company. That he has no possession or control of the lands, except that "he is a servant of said O. S. N. Co., and is on said lands solely for the purpose of carrying on the business" of his said employees.

The Oregon Steam Navigation Company, having filed its request in writing, and obtained leave to intervene, and to defend the action in the place of the said Joseph Baily, answered: that it "has not sufficient knowledge or information upon which to form a belief whether or not the plaintiff is incorporated."

That it (The Oregon Steam Navigation Company) is a corporation duly organized. * * * That it was formed for, among other things, navigating the Columbia, Snake and Willamet rivers; setting out as part of the answer, its articles of incorporation, showing that among its objects are the following: "Together with the construction and use of all necessary rail, or plank, or clay roads and bridges at any of the portages of the said Columbia, Snake or Willamet rivers, or to purchase, own and use any such roads." That the said Oregon Steam Navigation Company is owner of the land described in the complaint, and now owns and is using in its said business a line of railroad on the precise line described in the complaint as the plaintiff's proposed line.

That the same is necessary and convenient for and in the said Oregon Steam Navigation Company's said business, and is not subject to appropriation by the plaintiff.

That the value of the land described in the complaint is \$200,000; and the damages to defendant which would result from the appropriation of them by the plaintiff will be \$200,000.

The replication, by alleging want of knowledge and information, traverses the allegations of the answer.

W. W. Chapman and Mitchell, Dolph & Smith, for the plaintiff.

Logan & Shattuck and Wm. Strong, for the defendants.

The replication having been filed at a preceding term, and the case now coming on for trial, the plaintiff moved that the defendant be required to elect upon which of the several classes of defenses pleaded in the answer, it would rely.

The defendant objected that it was too late after replication to make the motion.

It was held that the several issues could not be tried at the same time.

The plaintiff announced that he waived the first defense, namely, that the plaintiff was not an organized corporation.

The plaintiff renewed his motion, insisting that under section 45, page 671, of general laws, the defendant could not set up a defense that the land was not liable to appropriation, and at the same time claim damages and try the question of value. The court expressed the opinion that the two defenses required separate trials, if the plaintiff insisted on the objection.

Thereupon the parties stipulated that both questions be tried at the same time, and by the same jury, and that if the first of these issues should be found against the defendant, the defendant should pay the costs of the present term. The defendant filed a written motion that the jury view the lands in question.

A jury of twelve was selected and sworn, and the respective parties stated the case to the jury. The respective parties consented that the jury separate for such time as should by the court be deemed proper, and waived the necessity of the jury being kept together, and of an officer attending or taking charge of the jury upon occasion of a view of the premises, and consented that the jury now separate to go by steamer to the premises in controversy. By consent, a person was appointed to show the jury the premises.

UPTON, J. then admonished the jury as follows: "You are not to converse with each other nor with any other person, nor express any opinion on any subject connected with this trial, until the case is finally submitted to you. This direction must also be observed while you are absent from the court for the purpose of viewing the premises in question. The object of this view is to make you acquainted with the land that is sought to be condemned or appropriated, and with the country surrounding it, that you may be the better enabled to judge of the situation of the parties and their property, and the rights that may be affected by the result of the action. The person appointed for that purpose will point out to you the premises in question, the particular lands claimed by the plaintiff, and the lines and the monuments of the survey of the premises; and it will be your privilege and duty to observe these, and the geography of the surrounding country. You should not permit any other person to converse within your hearing on any subject connected with the trial.

On the trial of the cause the first important question will be whether the plaintiff is entitled to have this land appropriated. This may depend upon the law or upon the facts of the case, or it may be a question depending both upon the law and the facts.

It is the right of the parties to be fully heard on the question in controversy, before any conclusive opinions are formed by you. You will, therefore, as far as possible, avoid coming to any settled conclusions in your own minds, on any of these questions, until the case is finally submitted to you. It may become your duty, in the course of the trial, to estimate the damages that would be occasioned by appropriating the premises for the plaintiff's road. One object of the view is, that by seeing the premises and learning the situation of the surrounding country, you may be better prepared to understand and weigh the evidence the parties may offer on that subject. You are permitted to separate and will meet upon the steamer on Wednesday morning, and be present in court on Thursday morning next, at 9 o'clock."

On the trial it was shown by inspection of articles of incorporation of the plaintiff and of the defendant, that each was incorporated for the purposes stated by each respectively in the pleadings. That the proposed railroad line was identical in locality with a line of railroad constructed or purchased by the defendant, the O. S. N. Co., about 1862.

The evidence was conflicting as to whether that railroad ought to be considered as in use at the present time by the O. S. N. Co. as a part of their general line, or means of transportation between Portland and The Dalles. The Cascades is a *portage* on the Columbia River about midway between Portland and The Dalles, of about three miles, over which freight or passengers cannot be conveyed by boats. The evidence shows that at one time the railroad on the Oregon side, which is identical in locality with the plaintiff's proposed line, was used by the O. S. N. Co. as their sole means of connection between their steamers, above and below the *portage* at The Cascades. That about 1862, the same persons who were the stockholders of the O. S. N. Co., became the stockholders of a company, incorporated under the laws of Washington Territory, known as the "Cascades Railroad Company;" which last named company became and are owners of a good and well equipped railroad, extending from the upper to the lower extremity of the portage at the Cascade. About that time, the last named company leased the last named railroad to the O. S. N. Co., at a certain price per ton for freight and a certain rate *per capita* for passengers. The lease has been renewed from year to year, and the O. S. N. Co. still holds possession of the last named railroad as tenant of the said Cascades Railroad Company, and nearly all its freight and passenger business at that point is done by means of that, road, on the Washington Territory side of the Columbia, that road being a good T rail structure, operated by good locomotives. The road on the Oregon side is constructed with "strap rails," is in a bad state of repair, and operated only by horse power. There was conflicting evidence whether during the five or six years the latter road

had been used at all as a connecting link between the steamers above and below the portage. Some of the witnesses testified, that during that portion of the year when emigration was largest, it was used for transporting the wagons and furniture of through passengers or emigrants who chose to transport their own live stock over or around the portage. And also, that live stock was taken by that route at a lower price than on the Washington Territory side, and was detained one day longer on the trip when taken that way.

It was testified, that the Cascades Railroad Company was indebted to the O. S. N. Co. for money advanced in the construction of its road, and thus owed more than it could pay.

The intervenor introduced a patent and deeds to show title to the lands in question. Some of the intervenor's witnesses estimate the value of the land sought to be appropriated at \$200,000. Some of the plaintiff's witnesses estimate it at not more than two or three dollars per acre.

Mr. Burrage, an engineer, testified, that the line described by courses and distances in the complaint, followed the south rail of the O. S. N. Co.'s railroad.

The plaintiff asked his witness the following question:

"What is the value of a strip of land forty-five feet wide lying three feet southerly from where the south track of the old railroad was laid?"

The plaintiff objected to the question as irrelevant, and the objection was sustained.¹

The plaintiff asked of the defendant's witness, who was vice-president of the defendant, on cross-examination:

"Did you not, in 1869, furnish to the county assessor a written statement of the value of that property?"

The witness answered: "I did."

The plaintiff then asked: "What was the value stated by you to the assessor?"

The defendant objected that the writing was the best evi-

1. The plaintiff claimed that by analogy to proceedings in possessory actions and by the provisions of section 317 of the code, the plaintiff may have condemnation of a part of the lands, if not the whole.

dence, and that the admissions of a stockholder were not the admissions of the corporation.

The objection was sustained.

The plaintiff offered in evidence the county assessment roll of 1869. The defendant objected to it as incompetent, and the objection was sustained.¹

The plaintiff then proposed to prove that the object of the O. S. N. Company, in keeping possession of the ground in controversy, was not transporting over it, but was to prevent others from using it, to enable the O. S. N. Co. to monopolize the trade of the Columbia River, and asked the following: "What is the rate per ton for freight from the Lower Cascades to The Dalles?"

The question was objected to as irrelevant, and the objection was sustained.

The plaintiff asked the following instructions, which the court declined to give:

1. "The defendant, by mere act of incorporation, acquired no franchise from eminent domain, and therefore if the jury believe that the defendant has not condemned the land in controversy, under the laws of the State of Oregon, then the defendant is a mere private owner, and the lands are subject to condemnation by the plaintiff, or to the plaintiff's use."

2. "If the defendant once acquired a right to use the railroad on the Oregon side, and a right to use it as part of their line of transportation, and has since forfeited it, the land is subject to be condemned to the use of the plaintiff."

The following, asked by the plaintiff, were given:

3. "If the defendant once acquired a right to use the railroad on the Oregon side, and has since abandoned all intention of using it as a part of their line of transportation, the land is subject to be condemned to the use of the plaintiff."

4. "If the sixty feet claimed by the plaintiff has once been condemned to the use of defendant, under the laws of

1. By the statute, the assessment is made on the estimate of the assessor, and not on that of the owner of the property.

this State, the same may be again condemned to the use of the plaintiff, if it can be so condemned and used by the plaintiff without interfering with its use for the purposes of the defendant."

The following instructions, asked by the intervenor, were given :

5. "To constitute an abandonment by the corporation, it must appear that the company has voluntarily abandoned and given up all intention to use the road as a part of their line of transportation."

6. "If the O. S. N. Co. purchased the land upon which this road is laid and appropriated it for a railroad across that portage, then it was not necessary that it should be condemned under the statute, to give the company all the rights they can in any way acquire under their article of incorporation or under the law."

7. "The Oregon Steam Navigation Company have a right to transport their freight and passengers on either or both sides of the river, without forfeiting their right to a line for a road on the Oregon side, provided they did not abandon their intention to use the Oregon side."

UPTON, J., gave the following charge :

In this action the plaintiff seeks to condemn lands for the purpose of constructing a railroad. A defense set up is, that the defendant, as a corporation, is entitled to use, and is using, the same land for the purpose of operating the defendant's railroad. The value of the premises is also put in issue.

The first point to which I will refer is the defendant's rights as a corporation, if it has ever been empowered to operate a railroad on the premises in question.

Formerly, corporations were formed by a direct grant from the sovereign power. The instrument in which the grant was expressed was called a charter, and it was the practice in most of the states of the Union, until recently, for the legislature to grant charters. Each corporation was created by a special act of the legislature.

This practice conferred special favors, and was thought

to have a bad influence upon legislation. When our constitution was formed, it was provided that no corporation should be created by special act of the legislature. The words of the constitution are, "Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended or repealed, but not so as to impair or destroy any vested or corporate rights.

The word corporation is here used to denote such ideal bodies as had formerly been created under that name by charter or by special legislative acts; and that meaning must be given to the word corporation in construing the general law that provides the mode of forming corporations.

Formerly, legislatures having power to grant charters, could place such restrictions upon the corporation at the time of its creation as legislative wisdom should suggest; but whatever right or power was then unconditionally conferred, became inherent or vested in the corporation. Concessions to corporations are in the nature of grants. So our legislature acting under this provision of the constitution, has the power to provide by general law to confer such rights and powers on corporations.

The object and effect of the constitutional provision is, not to change the nature or character of the corporate body, but to place all men on an equality in obtaining these privileges, and to disconnect the business of granting charters from the business of legislation.

The legislature, in passing such general law, can undoubtedly place upon corporations such restrictions as the public good may require, and may provide by general law for conferring powers similar to those formerly conferred by acts of special grant. The evidence of the powers of a corporation is now to be found in the general law, and in the articles of incorporation filed by the company, as formerly this was contained in the charter.

In a case reported in 2 Gray, 1, Chief Justice Shaw says: "The act, like every act and charter of the same kind, is a contract between the government on the one part, and the

undertakers (corporators) accepting the act of incorporation on the other."

* * * "It conferred on the persons incorporated the franchise of being and acting as a corporation." * * * * "It confers the right to collect such tolls as the corporation shall fix." * * * "This is in every respect a *public* franchise, which no one could enjoy but by the authority of the government;" and still speaking of the character of the grant, it is added: "It was made by the government in its sovereign capacity with subjects who were encouraged by it to advance their property for the public benefit." * * "It was, therefore, a covenant for quiet enjoyment against its own acts and those of persons claiming under it."

The general corporation act of this state confers on the corporators the right to pursue the business for which they lawfully incorporate, and during the period fixed for their corporate existence. It allows private property to be appropriated for the use of the corporation, whether acquired by purchase or condemned by the judgment of a Court. And both as to the extent of its use, and the time it may be used, it confers rights that are fixed, certain and positive.

Corporations are *quasi* public bodies. When private property is condemned to the use of a corporation, it is condemned to a *public* use. It will not be contended that private property could be taken for the use of a corporation upon a different theory.

When the sovereign power authorizes a railroad company to appropriate private property, it is upon the assumption that the railroad company is a public agent, and it appropriates the property for a public benefit and to a public use. And it is to that end and upon that ground alone that the legislature has any power to authorize a condemnation of private property to the use of another, without the owner's consent.

When a railway company acquires the right of way and constructs a road, under proper articles of incorporation, it acquires a right to hold such right of way and operate such road for the specified period; although the company is

serving its own special interest and actuated solely by motives of self-interest, this privilege and franchise is a right to act as a public agent, and to manage the road for a public use. The same jurist says: "If the government authorizes the taking of property for any use but a public one, or fails to make a compensation, the act is void." It is wholly immaterial upon this point whether such railway company obtains the property, which forms the road bed, by purchase or by the judgment of a court. The general corporation law and the act of incorporation under it, create the corporation and confer whatever franchises are granted or conferred. It is not the condemnation of property that gives character to the corporation. The judgment of the court is a means of placing the corporation in possession of what is necessary to a discharge of its franchise and its duties to the public. But when property is condemned, the corporation has no higher or better right to that property, than it has to property acquired by purchase.

It follows from what has already been said that, whether the right of way is acquired by gift, or by purchase, or by the judgment of a court, the corporation is so far a public agent, that what it holds in its corporate capacity is held for a public use.

In general, property necessary to such use and so held, is not liable to be condemned and appropriated to another corporation for the same use to which it has already been set apart.

A greater public necessity may arise, that will authorize a new appropriation or the subjection of the property to a new use. This may occur, for instance, when it is necessary for one railway to cross the track of another.

If a railway company could condemn and appropriate the ground and track of another similar corporation, so as to deprive the first of its use, a third company could immediately proceed in the same manner against the second. The proposition needs but to be stated to show its impropriety.

I have stated the law upon this point and the reason upon which it rests, thus fully, that the jury should be entirely

free from any doubt on this question while considering other important and controverted questions that arise in the case. It is claimed by the plaintiff that the defendant's business on the Columbia River is confined to a single line. That if the defendant operates a railroad on each side of the river, the defendant operates two lines and exceeds its powers, and that by using a road in Washington Territory, the defendant forfeits all rights to use a road on this side.

By the law and the articles of incorporation, the defendant is not limited to one side of the river, but has the right to transport goods and passengers around the rapids by such road or roads in its control as is necessary and profitable, without being limited to either side of the river.

It is also claimed by the defendant, that the road on the Oregon side is not necessary in the business of the company, and therefore the Oregon Steam Navigation Company, as a corporation, cannot hold it. A corporation has no right by virtue of its corporate power to the exclusive use of property that is not necessary and useful in the course of its business as a corporation. It is for you to determine as a question of fact, whether the road on the Oregon side is necessary to enable the defendant to carry on their business, named in the articles of incorporation, in a judicious and profitable manner. The plaintiff also claims that if the defendant did once acquire the right to operate a road on the Oregon side of the river, the defendant has abandoned the road and forfeited the right to use it.

What is properly called forfeiture may be distinguished from an abandonment. A corporation may forfeit its franchises and render itself liable to have them declared forfeited, but that question cannot be tried here. The question whether the defendant has abandoned this road, can be tried here.

To constitute an abandonment, it must appear that the defendant has voluntarily given up the intention of using this road as a means of transportation on this portage. It is a question of fact for you to determine whether the defendant has voluntarily abandoned the intention of using this road as a link in their line of transportation.

As to the right of the defendant to operate a railroad on the track lying in Oregon, it is proper to consider the subject, first, with a view to determine whether the company ever acquired the right to use it. For this purpose we should examine their articles of incorporation and determine from the articles what was the business for which the incorporation was formed. When this is ascertained, it is to be determined whether this road was such an one as the company was authorized to operate, and if it is such, whether the defendant did acquire it and operate it. If the defendant acquired it and operated it, and you find that it is not now necessary and convenient for a profitable transaction of the defendant's business—or that the defendant has voluntarily abandoned its intention to use it in that business, it is subject to be condemned.

If the defendant acquired a right to operate a railroad on the Oregon side of the river, the fact that there is another road which they can and do use, does not preclude a right to operate the one on this side, provided this one is still necessary and convenient in their business. Nor is there anything in the law to prevent the defendant's using a road on each side, if the legitimate business of the corporation is such that the two roads are necessary and convenient in that business. It is a proper question for you to consider whether the use of this land is necessary to a profitable transaction of the defendant's business; because the defendant has no right to an exclusive possession of lands that are not necessary and convenient in its business.

But it is not the province of this court to deprive the defendant of property that is necessary in that business, on the ground that the defendant is a monopoly. The law has provided a different remedy for that evil. The defendant cannot object to the appropriation on the ground that opening the route will build up a rival company; and the plaintiff cannot claim anything on the ground that competition would be a public benefit.

The plaintiff must show a right to take the whole sixty feet described in the complaint, or it cannot take anything in this proceeding. It is for you to determine, as a question

of fact, whether the road is one of the means of defendant's transportation and necessary to the defendant for the business for which it is incorporated. The defendant cannot hold lands that it does not need, merely in order to prevent competition by a rival company. Nor can the plaintiff take from the defendant what the defendant does need in its business on any claim that the defendant creates a monopoly.

If you find that the land is not subject to appropriation, you will say so by your verdict, but if you find that it should be appropriated, you will estimate its value at what you think it is worth.

You are to judge of the credibility of the witnesses, and the weight of their testimony, their means of knowledge, and on questions of value, of the soundness of their opinions.

The defendants had a verdict, that the lands in question were not subject to condemnation.

The plaintiff moved for a new trial.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1869.

THE OREGON CASCADES R. R. CO., PLAINTIFF, v. THE OREGON STEAM NAVIGATION CO., INTERVENOR.

NEW TRIAL—PREPONDERANCE OF EVIDENCE.—A verdict that is subject to no other objection, should not be set aside because the Judge differs from the jury, as to the preponderance of evidence.

POSSESSION—EVIDENCE OF TITLE.—Quiet and exclusive possession is evidence of title, until a better title is claimed and shown by another.

IDEM.—A railway corporation cannot procure a judicial condemnation of lands, when it can agree with the owner, as to its purchase.

NEW TRIAL—JUROR'S AFFIDAVIT.—It would be of dangerous tendency to set aside a verdict, on the ground that the juror has, after the trial, a different conception of the law, or of the facts, from that under which the verdict was rendered. A juror's affidavit cannot be received to show a mistake in making up the verdict.

WAIVER OF OBJECTION.—When a view has been had and counsel have accompanied the jury, and knowing the facts, consent to conclude the trial, it is too late after verdict, to raise the point that the jury did not have a full view of the premises.

The jury having rendered a verdict in favor of the intervenor, the Oregon Steam Navigation Company, the defendant filed a motion for a new trial. The exceptions are stated in the opinion filed.

W. W. Chapman and Mitchell, Dolph and Smith, for the plaintiff.

Logan & Shattuck and Wm. Strong, for the intervenor.

UPTON, J. The point first presented by the plaintiff as ground for a new trial, is, that the evidence is insufficient to sustain the verdict. To sustain the allegation of failure of evidence, these points are presented:

1st. That the defendant had abandoned the use of the premises for railway purposes. On this subject the evidence is conflicting. A verdict that is subject to no other objection should not be set aside because the judge may differ from the jury as to the preponderance of evidence.

2d. That the defendants proved no ownership of the land.

I think the evidence shows the intervenor to be owner in fee by legal title. Be that as it may, the intervenor was unquestionably in the quiet and exclusive possession. This is evidence of title until a better title is claimed and shown by another.

3d. That the land had not been condemned by a court to the use of the defendants. A railway corporation is not empowered to procure lands to be condemned by the judgment of a court, if it can agree with the owner and can purchase. It necessarily follows that the right of way may be obtained by purchase without resorting to an action.

The next point is one that was sternuously urged both on the trial and on the argument of this motion. When clearly stated it amounts to this: the land in question is the only pass through the Cascade mountains, lying in this state, and both plaintiff's and defendant's roads might be operated

within the sixty feet. This point is fully answered by saying the complaint in this case demands the whole sixty feet.

Another ground for asking a new trial is based on alleged misconduct of the adverse party.

In support of this ground two affidavits are produced; one is that of a juror who deposes that he was not taken on to the ground in *Washington Territory*; and gives a detailed statement as to how he understood the instructions of the court. The other is that of counsel in the case, who deposes that the jury was not taken into *Washington Territory*, and states the reasons that induced him to consent to go to trial with less than twelve jurors.

The affidavit of the juror is inadmissible to impeach the verdict, or even to show a mistake in making up the verdict. (4 John. 487; 5 Cow. 106; 6 Id. 53.) Nor can it be received to show what passed in the jury room. (2 Tyler 11; 3 Gil. & John. 473.) Nor on account of an afterthought of the juror. (2 Sayre 35.)

It would be of dangerous tendency to permit jurors to reconsider their verdict after they have been discharged, upon the ground that they now have a different conception, either of the facts or the law, from that under which the verdict was rendered. It would be permitting parties and counsel to retry their cases upon *ex parte* arguments addressed to individual jurors, who, from natural commiseration for the losing party, are not only open to new impressions inconsistent with the whole truth of the case, but are liable to be led into concessions and statements, imprudently or carelessly made, which, being once made, it is difficult for them to retract or to explain without appearing discourteous, or even appearing to be partisans in an affair that is not their own. Besides these considerations, we know that affidavits drawn by counsel to meet a particular point in cases of this kind, would frequently fail to disclose a full statement of the concessions thus incautiously made by jurors, with the reasons and the reservations that accompany them. Admitting such affidavits would open a new and alarming source of litigation, and if practiced it would be difficult to say when an action would terminate.

One point set up by the affidavits is that the intervenor having volunteered to convey the jury in its steamboat, the jurors were not taken over that railroad at the Cascades, which is in Washington Territory.

A person was selected, with the approbation of both parties, to show the jury the premises in controversy. He was instructed to point out to the jury the particular lands claimed by the plaintiff, and the lines and monuments of the survey of the premises. And the jury were instructed that in making the view it was their privilege and duty to observe the geography of the surrounding country. Nearly the entire line of the railroad which is in Washington Territory can be seen from the places which the jury visited. No instructions were given that the jury should be taken beyond the bounds of the state, nor is it necessary now to express any opinion as to the propriety of such an act, or as to the power of the court to direct it. One of the plaintiff's counsel went with the jury, and probably knew all that is now known on the point here raised, before consent was given by him to proceed with the trial with eleven jurors.

It was in his power then to refuse to go on without further proceedings in regard to the view, one of the twelve jurors who had been selected and sworn, having failed to accompany his fellow jurors to place of the view. With a knowledge of the facts, the plaintiff's counsel consented to excuse that juror and go to trial with eleven jurors without further view. There is no ground for this objection after such consent, given with a knowledge of the facts. Besides this, it is difficult for one having a knowledge of the locality, to come to the conclusion that one could go up one side of the river at that place with a desire to learn the facts, without being supposed to understand the nature of the ground on both sides, or without being able to understand the evidence relating to the character and situation of the roads on the respective sides of the river, and relating to the nature of the business transacted on the Washington Territory side.

Several errors of law are assigned.

The first, second, third and fourth points under this head

are founded on misapprehension as to what is contained in the written instructions read to the jury, and now on file.

The fifth relates to the point previously mentioned, that the land was not condemned to the intervenor's use by a court, but only acquired by the ordinary mode of conveyance.

The motion for a new trial must be overruled.

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1870.

JOHN BOWMAN v. BEN HOLLADAY *et al.*

BREACH OF CONTRACT—JOINDER OF ACTIONS.—It is not an improper joinder of actions, to unite in the same complaint, a claim for wages, earned under a contract, and a claim for money due under the same contract, for time that has run since the plaintiff was refused employment contrary to the terms of the contract.

IDEM.—Where the plaintiff earned money, under a contract of employment, and the plaintiff was afterward discharged, contrary to the terms of the contract, and he has a claim also for money that has become due since that time under the same employment, for time that has run since his discharge, there are not necessarily two causes of action.

THIS case is presented, on demurrer to the complaint.

The complaint sets up a contract, under which the defendants employed the plaintiff to work for the defendants, as master machinist, one year, and agreed to pay him at the end of each month; for the first four months, \$125 per month, and for the residue of the year, \$200 per month. It is alleged that the plaintiff worked in pursuance of the contract, one and a half months, at the end of which the defendants discharged the plaintiff without cause, and the plaintiff was thereby thrown out of employment; that the plaintiff has, on his part, complied with the contract, and since his discharge, has been ready and willing to perform, and has tendered performance.

The suit was commenced after the expiration of the first two months, and the plaintiff claims \$250, now due upon

said contract, less \$100, which he admits has been paid. The defendants, for cause of demurrer, claim that:

- 1st. Two causes of action are improperly joined.
- 2d. The two causes of action are not separately stated.
- 3d. The complaint does not state facts, constituting a cause of action.

Logan, Shattuck & Killen, for the plaintiff.

Mitchell & Dolph, for the defendants.

UPRON, J. The argument in support of the demurrer, assumes that there is an action for *money, due* on contract, and another cause of action for *damages* for the *breach* of a contract, and that the two causes of action are so essentially different from each other, that they cannot both be properly set forth in the same complaint, or sued in the same action. In every action for money due according to the terms of a contract, the gist of the action is the breach of the contract, and a cause of action does not arise, until some condition of the contract has been broken. Every such action is an action for damages, for a breach or violation of the contract. There is no such distinction between the two alleged claims or demands, mentioned in the argument in this case, as exists between a cause of action for damages, for the breach of a contract, and an action for a tort.

If a contract has been broken in two particulars, even if the breaches are such as to give rise to two separate causes of action, I see no reason why redress may not be had for both injuries in the same action. I think the assumption that the complaint discloses two causes of action is erroneous. The only matter for which redress is asked in this case, is the non-payment of wages alleged to be due. If the plaintiff has a just claim for more money than he had earned up to the time he was discharged, that claim is for wages alleged to be due. It is true, that according to the allegations of the complaint, a portion of the wages accrued while the plaintiff was at work under the contract, and a portion accrued while he was offering to work in pursuance of the contract, and after he was refused permission to

work; but nothing else but wages is claimed, and the facts set out lay the foundation for nothing else. The plaintiff states that he "was thrown out of employment against his will," but the claim is not for damages sounding in tort, nor does the complaint indicate that the plaintiff avails himself of his privilege to rescind the contract.

In this class of cases, the law gives to the person who, without fault of his own, is thrown out of employment, an option to rescind the contract and sue at once for whatever damages result from the breach of the contract, or to hold the contract still in force and claim his wages as, from time to time, the money becomes due.

The demurrer should be overruled.

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1870.

J. M. RITCHEY v. O. RISLEY ET AL.

MECHANIC'S LIEN.—Under the statute of 1853, the lien of the builder commences at the filing of the notice.

RELATION.—The lien of the mechanic may relate back to the commencement of the building, but it is not a lien until the notice is filed.

EXISTING LIENS.—A sale under the statute of 1853 upon a foreclosure of the mechanic's lien, is intended to pass a title free from all liens created after the commencement of the work.

PRIVIES.—Judgments and decrees bind only parties and privies.

THE plaintiff sues to foreclose a lien for lumber furnished in the construction of the house of Caroline, the wife of David Wittenberg, at the request of the husband and wife; the plaintiff having filed notice of his lien on May 28, 1869.

O. Risley, alone defends. He claims title, as purchaser, under a decree of foreclosure rendered in this court, foreclosing a lien of O. D. Buck, for work and labor done in the construction of the same building. Notice of the lien of said Buck having been filed April 19, 1869, suit commenced May 3d, and decree rendered July 24, 1869.

The plaintiff moved to strike out all that part of the answer which sets up title under the lien of O. D. Buck.

The merit of this part of the answer was argued as upon demurrer.

Mason & Gardner, for the plaintiff, cite 23 Cal. 208 and 522; 33 Cal. 497.

Bronaugh & Bybee, for the defendants.

UPTON, J. The points involved in the argument are whether one who holds an unrecorded mechanic's lien is entitled to be made defendant in a suit to foreclose. And whether, not being made a defendant, he is still entitled to hold a lien on the building, under the statute of 1853, after foreclosure by another, of a lien coexisting under the same statute. The lien law of California, passed in 1866, differs from ours in some particulars. The first section provides that all artisans, builders, etc., "shall have a lien on the building," and section 5 provides that "*from the time of such filing all persons shall be deemed to have notice thereof.*" (Wood's Dig. 537.) Our statute (Code p. 763) provides, that persons performing labor, etc., "shall *upon filing* the notice prescribed in the next section *have a lien* upon such building." Section 7 gives mechanics' liens a preference "*over all other liens after the commencement of the building,*" and provides, if the proceeds are insufficient to pay all, that the court shall order them to be paid *pro rata*.

The California act provides for bringing in lien holders by publication of a notice, while our statute merely gives them an option to come in as parties.

In California, it is held that the lien attaches from the time of the commencement of the work; that, I think is the obvious construction of that statute, but its language differs so materially in this respect from ours, that the decisions under it afford but little aid in arriving at a proper construction on this point.

I think, that under our act, the plaintiff had no lien until he filed his notice. He may have had such rights, as against other mechanics and material men, that had he made himself a party to the suit, his lien, although notice of it was not filed until after the suit was commenced, might have been en-

titled to a *pro rata* distribution of the proceeds of the sale on foreclosure. Filing the notice gives the lien; it may then relate back to the commencement of the building, but it is not a lien until the notice is filed. When the notice is filed and the claim becomes a lien, the holder becomes entitled to a *pro rata* distribution of the proceeds of sale, unless he has in some manner waived the right.

But I think it the intent of the legislature that a sale under a lien for work done or materials furnished in the construction of a building, should pass a title free from all liens created after the commencement of the work; and that if the plaintiff has any claim in consequence of his filing notice, it is for a share of the proceeds of the sale.

It is urged that one who is not a party is not bound by a decree. The rule is, that judgments and decrees bind only parties and privies. At the time of the commencement of the foreclosure suit, the plaintiff in this suit had a claim against the owners personally. Afterwards, he filed his notice, and obtained the right of holding a lien. This right he obtained from the owner. He obtained it through his contract with the owner, and by his own act of filing the lien. At the filing, some of the rights of the owner in the property passed to this plaintiff. To that extent he is a privy, and is bound by that which binds the person through whom he acquired his lien.

If the present plaintiff's notice of lien had been filed before the original suit was commenced, and had his lien then attached, it might well be said it could not be divested without notice to, or service of process on, the holder of the lien; (1) but by filing his notice during the pendency of the suit, he placed himself in a position somewhat similar to that of a purchaser *pendente lite*.

It would lead to great confusion of titles, or of priorities of claim, and would greatly depress the prices to be obtained for property at judicial sales, to allow repeated sales of the same property on co-existing liens; and the language of section seven of the act, is certainly against such a course.

The answer should be allowed to stand.

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1870.

M. LANNAHAN v. MULTNOMAH COUNTY.

WITNESS FEES.—The provision of statute that requires a witness in a criminal case to claim his fees at the same term at which the witness attended, does not deprive the witness of a constitutional right; it only points out the remedy the witness is to pursue.

THE plaintiff was required to, and did, enter into an undertaking, that he would appear as a witness in the case of the *State v. Hayden*, that defendant being charged with murder. The plaintiff alleges that he attended this court thirteen days at the June term thereof, and eighteen days at the following term, and that he necessarily lost, in all, one hundred and five days of time in obeying the order of this court in that behalf; that his place of business was so remote that he could not return to it during the interval between the said terms; that the said county had paid \$26, and refused to pay more.

A. C. Gibbs, District Attorney, for the defendant, demurred to the complaint on the ground that it does not state that the plaintiff claimed his fees at the term at which the witness attended, in pursuance of s. 20 of the act concerning fees.

Lansing Stout, for the plaintiff. The constitution, art. 1, sec. 18, provides, "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation."

BY THE COURT. UPTON, J. If the plaintiff did claim his fees at the term, I am not certain that it is one of the facts he is required to state in his complaint. If the point is material, the defendant can set it up in the answer, or possibly it may be sufficient to raise it upon the trial, by objection to the introduction or to the sufficiency of the evidence. I deem it a safer course to overrule the demurrer.

The defendant answered, that at the first term mentioned, the defendant claimed for thirteen days' attendance,

and the claim was allowed by the county court and paid, and that no other claim had been made by the plaintiff at any term of this court. No replication was filed, and the plaintiff and defendant each moved for judgment on the pleadings.

Judge Stout, for the plaintiff. The provision of sec. 20, p. 740 of the code, that "the *per diem* of a witness in a criminal action shall be claimed" at the term, must receive a construction consistent with its constitutionality. The legislature cannot deprive a witness of his compensation, and the provision must be directory only, or it conflicts with the constitution. The judgment should be for the plaintiff, not only for the eighteen days of the second term, but for ninety-two days, at two dollars per day. While a witness is in custody he is, in contemplation of the law, in attendance upon court. If he has given the required undertaking and yet has been unavoidably compelled to lose time, he is equally entitled.

By the Court. The provision of the act in relation to fees does not conflict with the constitution by depriving a witness of compensation. It does not relate to the right, but to the remedy. It is the right and the duty of the legislature to provide the means by which the witness shall obtain compensation. In requiring him to make his claim in a given manner and within a given time, the legislature has acted within its powers, and if the witness fails to pursue the remedy, he is the only party in fault. The statutory provision does not deprive the witness of the constitutional right to compensation; it only points out the remedy the witness is to pursue.

The judgment should be for the defendant.

CIRCUIT COURT FOR CLACKAMAS COUNTY, MARCH TERM, 1870.

**JAMES K. KELLY v. PEOPLE'S TRANSPORTATION CO.,
THOMPSON, LOVEJOY *et al.***

CORPORATION—DISABILITY.—It has been held that where lands have been purchased by a corporation that was not authorized to hold the premises, and by the corporation conveyed to a third party, a good title passed by the conveyance.

POWERS OF CORPORATIONS.—The power to purchase lands was at common law incident to corporations.

INCIDENTAL POWER.—Corporations may do many things incidentally, although the power is not expressly conferred. What is within the spirit and meaning of the statute conferring the power, is within the authority conferred.

VOIDABLE DEED.—An application to set aside a voidable deed, is addressed to the equity side of the court. And a grantor who seeks to show that his own deed is voidable, has no standing in a court of equity while he retains the purchase price.

USURPATION.—If a corporation has usurped privileges or franchises not belonging to it, to the detriment of the public, the remedy is by an action, in the name of the State.

THIS is a suit for partition of a tract of land, lying on the west bank of the Willamet River, and extending above and below the Willamet Falls, at Oregon City. The plaintiff avers that he is owner of an undivided half of the parcel, and that the People's Transportation Company is the owner of the other undivided half, and that each of the other defendants claim an undivided eighth of said premises, adversely to the said People's Transportation Company. All the defendants who have answered, admit the plaintiff's title, as alleged. The People's Transportation Company answer, claiming title to an undivided half, and deny, that the other defendants have any interest in the premises.

The defendants, Thompson and Lovejoy, answer, denying that the People's Transportation Company have any interest in the premises, and set up title to an undivided fourth in themselves. They allege, that in 1862, the plaintiff Kelly, being owner of the entire premises, conveyed to the defendants, other than the People's Transportation Company, an undivided half of the premises. And that said defendants,

3	189
29	526

other than the People's Transportation Company, in 1865, executed a conveyance to the Willamet Steam Navigation Company, purporting to convey to said Willamet Steam Navigation Company, the said undivided half; and that the latter company afterwards executed a conveyance, purporting to convey the same to the People's Transportation Company. That the Willamet Steam Navigation Company was a corporation organized, "for the purpose of carrying freight and passengers on the Willamet River, from its mouth to the head of steamboat navigation on said river, and transporting said freight and passengers over the portage at the Willamet Falls, by a railroad then constructed on the *eastern* bank of said Willamet River." That the company last mentioned, then owned said railroad on the east side of said river; that the lands in question were neither necessary nor convenient to carry into effect the objects of said corporation, and that said company was incapable of holding said premises. Similar allegations were made in regard to the defendant, the People's Transportation Company, the object of its incorporation being alleged to be, "for the purpose of carrying freight and passengers on the Willamet River, from Portland to the head of steamboat navigation on said river, and transporting freight and passengers over the portage at the Willamet Falls, by a railroad then constructed on the east bank of said Willamet River."*

A motion was made to strike out as immaterial and as being a statement of evidence and not of facts, the several matters set up affirmatively in these answers.

The motion was denied; it being *held* that some of the statements embraced in the motion were material allegations of fact.

The defendants, The People's Transportation Co., filed replications to the answers of the defendants, Thompson and

*On the trial, the articles of incorporation being exhibited, set out the objects of the incorporation of the People's Transportation Company, as follows: "The object of this incorporation, and the business in which it proposes to engage, is the transportation of passengers and freight on the waters of the Willamet and Columbia Rivers and their tributaries, and all necessary portages." The original answer failed to charge, in direct terms, what was the object of the incorporation, and being held bad on demurrer, the defendants filed their amended answer, setting forth the objects as stated in the text.

Lovejoy, and the cause was tried and submitted on the pleadings and proofs.

J. K. Kelly and *S. Huelat*, for the People's Transportation Co.

Mitchell & Dolph, for the defendants Thompson & Lovejoy.

UPRON, J. rendered the following decision:

The evidence shows that up to the present time the business of the defendant, the People's Transportation Co., at the portage, has been transacted wholly on the *east* side of the river. There was some evidence tending to show that, in case of very high water, a canal or railroad on the west side of the river, over the premises in controversy, would, if constructed, enable that company to do business more conveniently and profitably than it could be done on the east side. And that at some future time the P. T. Co. will, or may, have occasion to use a part of the lands in controversy, in the course of their business. And on the other hand, there was some evidence tending to show that the principal object of the P. T. Co. in holding the land, was to prevent its use by competitors.

I shall treat the case as if it were established as a fact, that the actual use of the premises in controversy, as a way or route for transportation, has not yet become necessary, and as if the transit on the east side of the river afforded a sufficiently good route; and shall consider the two questions—whether under this state of facts the corporation can hold the property; and whether, if a disability exists, the defendants, Thompson and Lovejoy are in a position to avail themselves of it. The former of these questions is now for the first time presented for adjudication in this state. This circumstance, as well as a knowledge that very large pecuniary interests may, in various ways and at various places, depend upon the rule that may be established, impresses me with the importance of arriving at correct conclusions; and I very much regret not being able to find authorities bearing more directly on the points involved.

There are several constitutional restrictions on the subject of corporations, but I am not sure that the questions here presented are affected by any of them, or by anything directly provided in the constitution, except the requirement that corporations should "be formed under general laws." By the general law, when three or more persons have complied with its provisions, "they shall thereafter be deemed a body corporate with power *** to purchase, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation."

The powers and the restrictions which we are to consider are to be found in the language above quoted, the articles of incorporation, and the common law, or the law as it would stand independently of the provisions of our constitution and statutes.

It is undoubtedly the intention of our statute, as well as of the common law, that a corporation should have power to make all contracts that are lawful and can ordinarily be made by individuals in the kind of business the corporation is authorized to transact.

To determine with what degree of strictness or of liberality the language of the statute is to be understood, is a principal question, and particularly in arriving at right conclusions, as to the use of the words necessary and convenient in this statute, and ascertaining the legislative intent they are designed to express.

It is evident we are not to construe the word "necessary" in a sense in which it is sometimes used, as nearly equivalent to indispensable. It is not indispensable that there should be a railroad or canal at the portage in question. It is possible to do the business by means of road wagons; but it is not to be inferred that the law would limit the corporation to the use of that kind of property. The difficulty is in determining at what point, in the broad range that lies between what is absolutely indispensable and that which is merely convenient or desirable, this language is intended to fix a limit.

To take a less extravagant illustration: a corporation

may need the use of lands or of buildings, and yet the existence of the corporation may be limited to a term of years. It might be said, it is not necessary, in order to carry into effect the objects of the incorporation, that it should be owner in fee of real estate. But yet such a corporation may acquire, hold and transfer the fee in real property. (*People v. Mauran*, 5 Denio, 389.) Or in the case of a railroad company, where it is necessary that the corporation should have a right of way, a mere easement, being only a privilege or liberty which one man has in the land of another; the ownership of the fee in the land over which the road runs may be convenient or profitable, but it will require a more liberal definition of the language of the statute than counsel have conceded, to enable us to say such ownership is necessary in order to carry the objects into effect. Yet it is held that such a corporation may acquire title in fee. (*Nicoll v. N. Y. & Erie R. R. Co.*, 2 Kern. 121.)

This corporation, according to the evidence, now holds, and is using in its business, a large amount of property, both real and personal, that, if we use the words in the more restricted sense, was not necessary in the business, at the time the land in question was conveyed, but which the increasing commerce of the country has rendered desirable, and which has now become an acknowledged necessity. It has been urged in argument in this connection, that an object of the law is to stimulate and encourage enterprise and to introduce the cheapest and most expeditious mode of transit, and that whatever is necessary to secure cheap and rapid transportation is necessary to carry out the object of the corporation, and this position appears to me sound.

What is necessary and convenient, must, of course, depend on the nature of the business, and the circumstances under which it is carried on. In all cases of uncertainty, it is evident the corporation, as purchaser, must judge in the first instance for itself whether the property is necessary and convenient; there is no tribunal to which it can resort to test the question in advance. After the property is pur-

chased, it may be still a disputed question of fact whether it is or not convenient and necessary; and it may remain doubtful until judicial determination. It would certainly be a very harsh rule that would, in all cases of an error in judgment as to the necessity of the purchase, hold the purchase absolutely void. And I presume it is to avoid so harsh a rule that courts have held that where lands have been purchased by a corporation and by it conveyed to a third party, a good title passes by the conveyances, even where the corporation was not authorized to hold the premises.

The power to purchase lands was incident to corporations at common law. (2 Kent, 281; 3 Pick. 239; 1 Ves. and Beam. 226.) And a corporation may do many things incidentally, although the power is not in the particular instance expressly conferred. (*Moss v. Oakly*, 2 Hill, 265; *Attorney-General v. Life and Fire Insurance Company*, 9 Paige, 470; *Jackson v. Brown*, 5 Wend. 590; *Gordon v. Preston*, 1 Watt. 385.)

These cases show that what is within the spirit and reason of the statute conferring the power, and pertains to the object sought to be obtained, is within the authority conferred.

I must say I am not fully satisfied that a corporation may not invest surplus funds in any property in which an investment will be advantageous, if it can be done without adding a new branch of business to that set forth in its articles of incorporation.

There is no statute expressly prohibiting a corporation from holding real estate; and evidently a corporation may increase its wealth. In most cases, the motive that induces individuals to create corporations is that of making profit; and the legislature knowing this, has not directed how or when surplus earnings shall be distributed. It will not be contended, I assume, but that corporations may, without any express grant to that effect, accumulate and hold money above what is actually necessary to transact the designated business. Yet, if we read the statute literally, their right to hold such surplus money is as restricted as their right to hold other property. Money may be held, if we treat its

acquisition as incident to the business, without entering on other business than that specified in the articles of incorporation. The question arises whether unimproved lands are not in the same category. It is certain that much of the business of the country is now based on the theory that such corporations may hold lands not directly used in their business.

Acts of congress and of state legislatures, and the business habits of the community, although not amounting to judicial construction, are resorted to, as being in the nature of contemporaneous construction, in cases where the legislative intent is doubtful. So also, whatever was the usage elsewhere under similar statutes, at the time this act was passed, it is of peculiar weight. It has long been the practice of the general government to grant large bodies of land to corporations created under similar statutes, and our own legislature has, by its acts, recognized the right of such corporations to take, hold and dispose of lands, the direct use or employment of which was not necessary to carry into effect the object of the incorporation. Such grants were made to corporations, similarly empowered, in other states, before the enactment of our general law, and a vast amount of real property now rests upon titles thus acquired, and much real property is now held by corporations in this state, the *direct use* of which is not necessary to carry into effect the object of the incorporation. I refer to these grave considerations not because I am prepared to conclude from them, or to decide that a corporation has the right to hold such property, but as in my mind very cogent reasons against a rule that would hold such grants absolutely void. It is, I doubt not, upon considerations of public policy, and in view of circumstances such as are above mentioned, that it has been held that even a corporation that is disqualified from legally holding, may pass a good title to its grantee.

It is said that this land was purchased to enable this corporation to prevent all competition, and that such practices would foster monopolies to the great detriment of the country. To meet such contingencies, and to protect the public,

the law has provided (Code sec. 353) for an action in the name of the state, in cases where a corporation "exercises franchises or privileges not conferred on it by law." It would seldom be necessary to resort to an action there authorized, if all excessive acts of a corporation were absolutely void; and the legislature, I think, has proceeded on the idea that many such acts are voidable, and not void.

It is also said that this is not a case of mistake of fact, or of error of judgment, but that the corporation made the purchase knowing that the property was not needed in its business. The theory under which it is attempted to avoid the deed, is, that purchasing or holding this land is exercising "a privilege not conferred by law," and that the deed is for that reason absolutely void for want of capacity in the corporation to take. Under this theory, it is immaterial whether there was a mistake of judgment, or an intentional violation of the law; for, under this theory in either case the deed is void, and not voidable.

If the case of the defendants, Thompson and Lovejoy, was based on a claim that the deed is voidable, the question would be addressed to the equity side of the court, and of course they, as grantors, while still retaining the purchase money would have no standing in a court of equity upon which to ask to have the deed set aside. They, being grantors for value, cannot maintain their claim to the land, under any view that can be taken, except as a strict legal right, founded on the assumption that the conveyance from them is void, and not merely voidable.

If the corporation has usurped privileges or franchises not belonging to it, to the detriment of the public, the remedy is by an action in the name of the state.

If the sale is illegal, and Thompson and Lovejoy sold the property with a knowledge of the illegal purpose, they are so far in the wrong as not to be in a condition to ask equitable relief. If they sold under a misapprehension of its powers, or of the objects sought to be carried into effect by the corporation, and now find that the sale should be declared void, their pleading should set out their excuse, and they should offer to return the purchase money.

The prayer of the defendants, Thompson and Lovejoy, should be denied, and the property should be partitioned between the plaintiff and the defendant, the People's Transportation Company. (b)

CIRCUIT COURT FOR MULTNOMAH COUNTY, APRIL TERM, 1870.

FREDERICK NORMAN v. AL. ZIEBER, SHERIFF.

JURISDICTION OF THE SUBJECT MATTER.—Although a complaint be objectionable on the ground that it does not state facts sufficient to constitute a cause of action, the court may have jurisdiction, and may permit amendment.

WARRANT OF ARREST.—Under section 107 of the code it is not necessary that all the jurisdictional facts should be recited in the warrant of arrest. If these facts appear in some anterior part of the record, it is sufficient.

HABEAS CORPUS—JURISDICTIONAL FACTS.—The jurisdiction of a committing magistrate may be put in issue on the return of a writ of habeas corpus.

ARREST IN CIVIL CASES.—The jurisdiction to issue summary process of arrest in civil cases is made to depend on the affidavit.

IDEM.—When no affidavit is made, or that which is made does not present a legal foundation for the issuing the writ, the writ and all proceedings under it are void.

IDEM.—Authority to arrest for fraud under sec. 107 of the code, is limited to the kinds or classes of fraud there designated.

ABSCONDING DEBTOR.—The term "absconding debtor" defined.

THE petitioner sued out a writ of *habeas corpus*. It appears from the petition, and the return to the writ, that a civil action was commenced in a justice's court, to recover \$46, upon an account stated, in which the plaintiff, Pierre Manceitt, filed an affidavit, and procured a warrant of arrest against this petitioner, who was defendant in the civil action, and caused the petitioner to be arrested. At the time the writ of *habeas corpus* was served on the sheriff, the petitioner was held in custody by the sheriff, by virtue of an order of commitment, a copy of which was annexed to the return, as follows:

(b) The cause was appealed to the supreme court and submitted and taken under advisement at the September term, 1870, but before the next term a compromise was effected and the cause dismissed without a decision being made in the supreme court.

"In Justice's Court, Central Portland precinct, Multnomah County, Oregon.

PIERRE MANCEITT }
v. }
FRED. NORMAN. }

The above named defendant having been brought before me, on a writ of arrest in the above entitled action, upon the ground that the defendant was about leaving the state, and the said defendant refusing to pay the account claimed by plaintiff, and in default thereof; it is hereby ordered that the said defendant be imprisoned in the county jail at the instance of plaintiff. To the sheriff of the said county and state. You are, therefore, in the name of the state of Oregon, commanded to receive into your custody, and safely keep the above named defendant, until otherwise legally discharged.

Portland, Oregon, April 6th, 1870.

JNO. C. WORK, J. P."

The sheriff, in his return, justified under this commitment, and no replication to the return was filed.

The petition sets out a copy of all the papers in the civil action, including the complaint, the affidavit and undertaking on which the warrant of arrest was issued, and the warrant.

The affidavit, after giving the venue the title of the court, and of the action, proceeds as follows:

"I, P. Manceitt, being first duly sworn, say, that I am the plaintiff above named, that the defendant is indebted to me in the sum of \$46, upon an account stated on or about the fifth of April, 1870, at which time defendant promised to pay said sum, \$46. Although requested, he has failed to pay said sum, or any part thereof, and the same is now due and owing plaintiff from defendant. And that defendant is about to leave the state of Oregon, with intent to delay, hinder, and defraud his creditors."

Mason and Gardner, for the petitioner.

The complaint in the civil action, was insufficient to give the justice jurisdiction of any subject matter.

The undertaking is not sufficient.

The affidavit is not sufficient to warrant an arrest.

By art. 1, sec. 19, of the constitution, "There shall be no imprisonment for debt, except in cases of fraud, or absconding debtors."

The commitment is insufficient.

W. Whaley, contra.

The imprisonment is legal. It is not necessary under the statute that the commitment recite jurisdictional facts.

The court will not on *habeas corpus* go behind the commitment.

The affidavit for the warrant of arrest shows a case of fraud, and the justice of the peace had jurisdiction to pass upon the question of fraud.

UPTON, J. I do not deem it necessary to say more in regard to the complaint and undertaking in the original cause than that they do not present defects not curable in the court where the cause is still pending. The spirit of the practice act, and the practice of courts under it, sustain the position that a complaint may be objectionable, on the ground that it does state facts constituting a cause of action, and yet the court may have jurisdiction to permit an amendment. And I think it equally in accordance with the true construction and intent of the code, that if the sureties in the undertaking are deemed insufficient, relief in that respect should be sought by application to the court where the cause is pending. If the complaint was defective, the point being raised by demurrer, the justice would have jurisdiction to pass upon it, and the question should be first raised in that court, and if the court should err, there is a remedy either by appeal or by *certiorari*.

There are grave and sound reasons why an application should not be made, on these grounds, to the circuit court in this form, before a similar application has been presented to the justice of the peace.

In a general sense, the jurisdiction upon *habeas corpus* may be said to be appellate, but it is not, strictly speaking,

a power of revision of an order or judgment previously made or rendered, because, in form, it does not undertake to affirm or reverse, although it may arrest the execution. The jurisdiction on *habeas corpus* is not necessarily referred to the powers derived from that part of sec. 9, art. 7, of the constitution, which gave the circuit courts "appellate jurisdiction and supervisory control over the county courts, and all other inferior courts, officers and tribunals;" but it is, in general, treated as an exercise of original jurisdiction. And whether the jurisdiction be considered as original or as appellate, it is inconsistent with the comity essential to the harmonious co-operation of the several functions of a body politic, that even an appellate tribunal should reverse for error, and set aside a judgment or order made by another tribunal while acting within its proper jurisdiction, for reasons or upon grounds which were never presented to the consideration of the court where the order was made. The record shows that the civil action is still pending, and it does not show that the objections to the complaint and to the undertaking have ever been made in the justice's court. When a question is pending in a court having jurisdiction to determine it, and is still undetermined, it would certainly be an extraordinary proceeding to resort to the writ of *habeas corpus* to procure a decision of the question elsewhere, before such court had been called upon to decide it. There is a marked distinction, in this respect, between questions that are within the jurisdiction, and questions upon which such court can make no binding decision. Inasmuch as the justice of the peace has power to permit amendment of the complaint and of the undertaking, it is not necessary to inquire into their sufficiency in this proceeding.

It is claimed that the petitioner should be discharged because what is here called the commitment does not show on its face that the court had jurisdiction to issue it.

On the other hand, it is as confidently asserted that the commitment being regular on its face, the petitioner can not go behind it to show that the court did not in fact have jurisdiction.

The petition and return taken together, show that a writ of arrest was issued, predicated upon the affidavit, and show what the affidavit contained. The petition also shows all the subsequent steps that have been taken. The statute of this state does not require that a warrant shall recite all the facts that confer jurisdiction, although it is still necessary that they should appear in the record and files of the court. In my judgment, the case now at bar would not be materially different if the warrant of arrest or the commitment contained a recital of all that is set forth in the petition. (Code sec. 107, sub. 5.)

What is here said is not in conflict with the well settled doctrine that an inferior jurisdiction, proceeding not according to the course of the common law, must show affirmatively upon its record all the facts necessary to give jurisdiction. On the contrary, what is here decided goes no further than to construe the code of practice to enact that these facts need not be recited in the process under which a person is held in custody. If they affirmatively appear in some anterior part of the proceedings and record, it is sufficient.

If there was nothing before us but the return, setting out this paper called a commitment, it is plain that the return would be insufficient to justify the imprisonment, because that paper is not a process recognized and declared sufficient by the statute; nor is it one which recites the facts necessary to show that the court had jurisdiction. In fact, I look upon it as no more than an order remanding the defendant into the same custody, to be held under the writ of arrest. After judgment, a further process may issue under sec. 273, but I know of no reason why the writ of arrest is not of force until the defendant is discharged, or until judgment is rendered.

It has been laid down as law, that "when the return shows a detainer on process, the existence and validity of the process are the only facts upon which issue can be taken." (3 Hill 658, note; *People v. Cassels*, 5 Hill 164.)

But this must be taken with some qualification, for in the latter case it was also said, the court or judge "may also

inquire whether the committing magistrate had jurisdiction, and this notwithstanding a recital of the necessary jurisdictional facts." Since the writ of habeas corpus is not designed as a writ of review, and does not deal with errors such as will render the proceedings voidable, but with such departures from regularity as render the proceedings void, inquiry will be confined to questions that go to the jurisdiction.

"It is a rule essential to the efficient administration of justice, that where a court is *vested with jurisdiction* over the subject matter upon which it assumes to act, and *regularly obtains jurisdiction* of the person, it becomes its right and duty to decide every question which may arise in the cause, without interference *from any other tribunal*." (*Smith v. Mc-Iver*, 9 Wheat. 532.) But "of the power to discharge from a void execution, no one ever doubted." (*Hurd on Habeas Corpus*, p. 342, 3 and 4.)

In the absence of statutory provisions to the contrary, it was formerly required that process of arrest or commitment, issued by inferior courts, recite all the facts necessary to show the jurisdiction of the magistrate; since that practice is dispensed with by statute, there is not the same reason for refusing to look beyond the face of the process as formerly, because it does not now appear upon the face of the process whether or not the magistrate had jurisdiction, and yet we find the weight of authority to have been, even under the former system, that the return might be disputed by showing want of jurisdiction, notwithstanding the process set out in the return, contained sufficient recitals. (*Id.* 397.)

I cannot doubt but that it is the right of the petitioner to dispute the jurisdiction of the court and ask to have the affidavit examined in order that it may be determined whether or not the writ of arrest is void.

There is no question but that the court had jurisdiction of the action; but the question is, whether there was jurisdiction to make the arrest. "Nothing shall be intended to be out of the jurisdiction of a superior court except that which specially appears to be so; on the contrary, nothing shall be intended to be within the jurisdiction of an inferior

court unless it be so expressly alleged." (1 Sanf. 74.) And it is laid down in 1 Smith's Leading Cases, 816, in regard to courts of record: "If the court is not in the exercise of its general jurisdiction, but of some special statutory jurisdiction, it is as to such proceedings an inferior court and not aided by presumptions in favor of jurisdiction." In regard to courts of inferior jurisdiction, "if the record does not show upon its face the facts necessary to give jurisdiction, they will be presumed not to have existed;" but it is said this presumption may be rebutted and the jurisdictional facts established by extrinsic evidence. (Hurd on Habeas Corpus, 370.)

So, in this case, we may look into the affidavit, to see what was the statement on oath, that preceded the writ, although no other part of the record contains a recital of the oath.

The affidavit presents the vital question in the case, for the jurisdiction of the Court to issue the summary process, is made to depend on the affidavit.

"Where a court exercises an extraordinary power under a special statute prescribing its course, that course ought to be exactly observed." (*Hatcher v. Powell*, 6 Wheat. 119.)

"When, therefore, no affidavit is made or that which is made, does not present a legal foundation for the issuing of the writ, the writ and all proceedings under it, are *coram non judice* and void, unless the defect be waived by the act of the defendant, or is by statute amendable, and be amended." (*Smith v. Luce*, 14 Wend. 237; 18 Id. 611; 21 Ib. 672; 4 Hill 598; 7 Ib. 187.)

"If there is no statutory authority for amending an affidavit, the court has no power to allow such an amendment." (26 Georgia, 577; 28 Ib. 27.)

The constitution of this state, art. 1, sec. 19, provides, "There shall be no imprisonment for debt, except in cases of fraud or absconding debtors." Section 106 of the code, provides that a defendant may be arrested in certain cases, there specified, and section 107 provides that the plaintiff shall be entitled to a writ of arrest when he shall make and file "an affidavit, that the plaintiff has a sufficient cause of

action therein, and that the case is one of those mentioned in section 106."

Affidavits that are the basis of statutory jurisdiction, must either "follow the language of the statute," or state such facts as to show that the case is clearly within the intent and meaning of the statute. It is not contended that it would be sufficient to insert in the affidavit the language of section 107. "That the case is one of those mentioned in section 106."

The 1st, 4th and 5th subdivisions of section 106, are all that it is necessary to refer to in this connection. They provide that the defendant may be arrested:

1st. "When he is a non-resident of this state, or is about to remove therefrom."

4th. "When the defendant has been guilty of a fraud in contracting the debt," * * * "or in concealing or disposing of the property," etc.

5th. "When the defendant has removed or disposed of his property, or is about to do so with intent to defraud his creditors."

The fourth and fifth subdivisions are referred to, to render it obvious that the allegations of the affidavit do not show a case within these subdivisions.

It was argued that if the affidavit did not show a case of an absconding debtor, it did show fraud. A conclusive answer to that position is that subdivisions 2, 4 and 5 specifically point out the *kinds and instances of fraud* that will justify an arrest; and there can be no pretense that the affidavit shows a case within either of those subdivisions. The constitutional provision is negative in its character, and has only a restrictive effect. It will not of its own force and without legislation, authorize an arrest in any case. The legislature having definitely provided in what cases and in what transactions the fraud shall be ground for an arrest, the authority to arrest for fraud is limited to the kinds or classes of fraud which the legislature has designated. The fraudulent intent mentioned in the affidavit does not come within any of the specifications of fraud pointed out in section 106. The remaining question is whether the affidavit

shows a case of an "*absconding* debtor" within the meaning of the constitution, and within the meaning of that part of the first subdivision of section 106, which provides that a defendant may be arrested when he "is not a resident of this state or is about to remove therefrom." The words "about to remove therefrom" are to be construed with reference to the subject matter, and with reference to the constitutional restriction. If the language will admit of a construction consistent with the constitution, such should be given, rather than a construction that would conflict with the constitution, and thus defeat the intent of the legislature by rendering their acts void.

The construction, to be consistent with the constitution, must include the idea of "*absconding*." Any "removal" that is neither fraudulent nor an *absconding*, could not under the constitution be made a cause of arrest. The act expressly names as cause of arrest, removal of property with intent to defraud creditors; and by omitting to mention the removal of the person with such intent, makes the conclusion unavoidable that the removal of the person with that intent is not of itself a ground of arrest, and that there must be an *absconding*, as distinguished from any other kind of fraud, to come within the provisions both of the act and of the constitution.

Bouvier defines "*abscond*:" "to go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed in order to avoid their process;" and the ordinary acceptance of the term includes an idea of secrecy. We must treat subdivision 1 of section 106 as unconstitutional and void, or it must be held that the "removal" that authorizes an arrest is something more than a mere leaving of the state in an open and public manner, or in the ordinary course of the defendant's business as an officer or seaman on board a vessel in which he has been habitually employed. The affidavit must be couched in the very words of the statute, or it must expressly show that the case is within the true intent and meaning of the act. It is not always the case that an affidavit following the words of the statute is sufficient, and it is not before me for determination whether

that would be sufficient under subdivision 1 of section 106 of the code. The affidavit in this case does not attempt to follow the language of the statute, nor does it state facts that show that the defendant had absconded, or was about to abscond, or was an absconding debtor; nor that he was guilty of, or about to commit any one of the kinds of fraud particularly specified in the statute as cause for arrest.

Until an affidavit is filed justifying an arrest, a magistrate has no jurisdiction to make the order or issue the warrant, and the proceeding, if any be had, is not voidable, but void. It is upon this ground alone that I feel justified in passing ultimately upon the application for a discharge, when the record does not disclose that an application was first made to the magistrate whose proceedings are called in question. But in this case the affidavit is insufficient and the court had no jurisdiction to issue the warrant or commitment. The petitioner is therefore entitled to be discharged from custody.

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CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1870.

EDWARD KAHN v. LEWIS LOVE.

NEGLIGENCE.—Where an occupant of a building sues the owner for damages for an injury to the plaintiff's person, caused by the unsafe condition of the building, he must show that the unsafe condition of the building is not the fault of the plaintiff.

LANDLORD AND TENANT—REPAIRS.—A tenant has no remedy against a landlord for suffering premises to be out of repair, unless the landlord has agreed to repair.

THE case is presented upon demurrer to the complaint. The facts alleged are, substantially, that the defendant, being owner of certain premises in the city of Portland, leased the building to the plaintiff and his two brothers; that a framed awning, attached to and part of the building, extending over a sidewalk of the public street, was badly constructed and insufficient, unsafe and dangerous to the

occupants of said building and to persons using the sidewalk; that the plaintiff, being ordered by the street commissioner to remove the snow from the awning, went upon it, without negligence or fault, and with care and caution; but from the insufficiency and defects aforesaid, it broke, causing the plaintiff to fall and to be greatly injured. The plaintiff lays his damages at \$25,000.

Caples & Moreland, for the plaintiff.

Logan, Shattuck & Killan, for the defendant.

UPRON, J. The complaint is silent as to the terms of the lease; it contains on that subject but the single allegation that the plaintiff and his two brothers "used and occupied the same as tenants of the said Lewis Love, and paid him therefor a stated sum as rent." The complaint contains the following: "By the laws and ordinances of the city of Portland it was made the duty of the defendant to make such repairs as might be necessary for the safety of travelers and persons traveling along and upon said street in front of said lot."

It is not to be presumed that the lease contained any covenants not expressly charged in the complaint. It does not clearly appear whether or not the defects in the awning existed at the time the tenants took possession, and I am not aware that it is a material point in the case.

"It is not in the power of the tenant to make repairs at the expense of his landlord unless there be a special agreement between them authorizing him to do this.

"The tenant takes the premises for better or for worse, and cannot involve the landlord in expense for repairs without his consent." (*Mumford v. Brown*, 6 Cow. 475.)

A tenant has no remedy against a landlord for suffering premises to be out of repair, unless the landlord has agreed to keep it in repair. Unless there be an express agreement to that effect, the tenant, whether for life, for years, or at will, cannot compel him to repair. (*Howard v. Doolittle*, 3 Duer, 464.)

For aught that appears in the complaint, the improper condition may have been the fault of the plaintiff.

The statement in general terms that the plaintiff exercised due care and caution on that particular occasion is not sufficient. The plaintiff in an action for damages occasioned by the defendant's negligence, must so frame his complaint as not to leave an inference that he was guilty of negligence that contributed to the injury; and the facts must show affirmatively that the injury was caused by the negligence of the defendant.

The demurrer is sustained.(1)

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1870.

JACOB KAMM v. J. B. HARKER AND ASA HARKER.

JOINDER OF PARTIES.—In an action on the note of a partnership firm against two defendants, a plea in abatement by one of the defendants that his co-defendant never was a member of the firm, and stating the names of the members of the firm, is not demurrable, as not constituting a defense.

IDEM.—**JOINT NOTE.**—One of the makers of a joint note has a right to have the other makers made parties to the action.

PARTNERSHIP.—A partnership firm does not have the power to sue and be sued; that power is in the individuals that compose the firm.

THE plaintiff declared against the defendants, J. B. Harker and Asa Harker, upon a promissory note for \$5,000 and interest, signed "J. B. Harker & Co.," and alleged that the defendants were partners, doing business under the firm name of J. B. Harker & Co., and as such made the note.

The defendant, J. B. Harker, demurred to the complaint as not stating facts, etc., but by leave abandoned the demurrer, and filed his separate answer, stating:

1st. That interest had been paid on the note to the amount of \$823.

2d. That Asa Harker never was a member of the firm of J. B. Harker & Co.; but that the firm was composed of J. B. Harker, B. Welman and J. M. Peck, when the note was

1. The plaintiff amended his complaint, and the case being tried by jury, the defendant had a verdict.

made. To the second part, or defense, of this answer, the plaintiff demurred on the ground that it does not state facts constituting a defense.

Logan & Shattuck, for the plaintiff.

Mitchell & Dolph, for the defendant.

By THE COURT, (UPTON, J.) This demurrer does not raise the question whether a plea in abatement can be plead at the same time with a plea in bar of the whole or a part of the same cause of action, nor was that objection urged on the argument. But it is claimed that, because it is alleged in the complaint that J. B. Harker, who is admitted to be a member of the firm that executed the note, "signed the firm name to the note in his own hand," and because that allegation is not denied, he is personally liable for the whole amount sued for, under any view that can be taken of the case; and that being himself personally bound, he can not set up a defense for Asa Harker. That the said J. B. Harker is the only defendant served, and the action should proceed as if he alone were sued. The allegation that the note is signed in his hand writing is not a material one. No material issue can be formed by its denial. It is merely evidence tending to prove that he is one of the makers of the note. But since he admits that he is a member of the firm that made the note, he is personally liable for its payment; and the real question presented by the demurrer is, whether one of several makers of a *joint* note, when sued alone, can compel the plaintiff to join the other makers as co-defendants. That was his right at common law.

The code provides (sec. 36): "Persons *severally* liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff."

Doubt has been expressed whether the framers of that section did not intend to change the law in regard to bills and notes, so as to give the payee of the bill or note, where the parties were *by its terms* only *jointly* liable, an option to

proceed against one of them *severally*. But I am satisfied that the legislature has not expressed that intention by the words employed, and that such construction ought not to be given to the statute. The language used does not indicate an intention to change the rule of law in this respect, and to treat parties as if they had contracted *jointly* and *severally* when they express in their contracts that they only intend to bind themselves *jointly*.

By using the word "severally" in the statute, a purpose to follow the rule of the common law in regard to joint notes, is indicated, and not an intention to give the plaintiff the option where the makers are only *jointly* liable.

The demurrer must be overruled.

It was by leave of the court, that the defendant answered over, and the leave was obtained without an exhibition of the proposed answer. Ordinarily, after a demurrer is overruled, leave should not be granted to enable a defendant to set up a defense, that does not go to the merits of the action. The plaintiff will be allowed at his option, to amend his complaint, changing the names of the parties to correspond with what is alleged in the answer, if he desires to do so.

Asa Harker had answered separately, setting up the same facts that were answered by J. B. Harker.

The plaintiff replied to each answer; want of knowledge or information sufficient to form a belief, putting all the allegations as to the firm at issue, but not denying the payment of \$823 interest.

A jury was selected and sworn, and the plaintiff asked the court to direct the jury to find specially upon the following questions:

Was Asa Harker a member of the firm of J. B. Harker & Co., at the date of the note?

Were B. Welman and J. M. Peck members of that firm at that date?

On the trial, it was shown conclusively that Asa Harker was not a partner with J. B. Harker, at the date of the note. It was shown that at that time, there was a firm of merchants, consisting of J. B. Harker, B. Welman and J. M.

Peck, commonly called "Harker & Co.," and having that name displayed as a sign, on their business house in Portland. But it was also shown that they sometimes called the firm name "J. B. Harker & Co.," and so wrote the name in some of their business letters, addressed by Welman and Peck to J. B. Harker.

The evidence was conflicting, as to whether the business of the firm was such as to give a partner power to borrow money, in the name of the firm (the note sued upon, being given for money borrowed.) After the close of the evidence, the defendant's counsel asked that if the jury were instructed to find a special verdict, they be instructed to find "whether or not the defendants, J. B. Harker and Asa Harker, made the promissory note described in the complaint." Thereupon, the plaintiff asked leave to amend his complaint by dismissing the case as to Asa Harker.

The defendant, J. B. Harker, objected, on the ground that the complaint alleged a joint contract, and that J. B. Harker could not be sued alone upon it.

E. D. Shattuck, for the plaintiff. Cited sec. 36 of the code, claiming the right to proceed against J. B. Harker alone, if the jury find that Welman and Peck were not partners, and to amend so as to make them defendants, if the jury find they are parties. On the subject of amendment, he cited sections 94, 95 and 104 of the code.

J. H. Mitchell, for the defendants, claimed that having sued a firm, the proposed amendment would not be within sec. 99, but would "substantially change the cause of action."

BY THE COURT. There are two defenses in abatement of the action set up, namely, misjoinder and non-joinder, and the answer also alleges part payment, which is in bar, but no objection has been made to joining these defenses in the same answer. Is it expected that the verdict to be rendered will be followed by final judgment, or only a judgment in abatement?

Judge Shattuck, for the plaintiff. The alleged payment of \$823 is not denied, but we admit the payment as alleged. The action is against the firm, and if the jury find that Welman and Peck are members, their names can be inserted. If they are not, as it is alleged that J. B. Harker signed the firm name to the note, he is bound personally, whether any other person is bound with him or not.

By THE COURT. We often speak of a partnership firm as being the party plaintiff or defendant; but in truth a partnership does not, like a corporation, possess the power to sue and be sued. It is the individuals who compose the firm that can sue, and they only are the persons sued. (1)

I have doubts whether it is permissible, where the complaint sets up a joint contract made by two or more, to allow the plaintiff to proceed as if upon an individual contract made by one only. In order to amend so as to include Welman and Peck, the plaintiff will be compelled to admit the truth of the plea as to Welman and Peck, in which case there will be no question for the jury. If, however, the plaintiff deems it safe to amend by striking out the name of Asa Harker, he has permission to do so, and the defendant's objection can be considered a motion for on new trial.

The plaintiff withdrew his motion and submitted to a nonsuit.

CIRCUIT COURT FOR CLACKAMAS COUNTY, AT CHAMBERS, AUGUST, 1870.

JOHN MYERS, APPELLANT, v. ARTHUR WARNER,
RESPONDENT.

CONTESTED ELECTION.—SPECIAL PROCEEDINGS.—In a special proceeding, to contest an election, under sections 37 and 38 of the act relating to elections, the notice is the commencement of the proceeding, and the court acquires jurisdiction by its service and return.

1. (*Fantine v. Crane*, 1 Wend. 524.) The contract alleged is not several, but is the joint contract of J. B. and Asa Harker. (1 Chitty Pl. 42.)

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JURISDICTION.—The court has no jurisdiction to hear any motion in the case until the return.

NOTICE.—A notice that does not state a definite time for the hearing is of no avail.

IDEM.—When the time stated is "at the next term of the circuit court of said county, or as soon as said judge will hear the same," the indefinite words may be rejected as surplusage.

JUDGE AT CHAMBERS.—The purport of the words the judge "shall make all necessary orders for the trial of the case and carrying his judgment into effect," is to give the judge at chambers power to do whatever the court could do in term time.

TIME OF HEARING.—The plaintiff having named a day for the hearing, his motion for an earlier day was denied.

THIS is a special proceeding under the statute, to contest an election to the office of sheriff of Clackamas County. The plaintiff having fixed in his notice a time for the trial, moves for an order setting an earlier day for the hearing of the cause. The facts appear in the opinion.

Kelly & Reed and Lansing Stout, for the plaintiff.

Johnson & McCoun, for the respondent.

UPTON, J. In this case the plaintiff proceeds under the statute found on page 707 of the code, to contest the election to the office of sheriff of Clackamas County. The case is brought before the circuit court, at chambers, on the plaintiff's motion for an order that the case be heard at an earlier time than that specified in the notice.

The statute by which the proceeding is authorized is as follows :

Sec. 37. "Any person wishing to contest the election of any person to any county, district or precinct office, may give notice, in writing, to the person whose election he intends to contest, that his election will be contested, stating the cause of such contest briefly, within thirty days from the time said person shall claim to have been elected."

Sec. 38. "Said notice shall be served in the same manner as a summons, ten days before any hearing upon such contest as herein provided shall take place, and shall state the time and place that such hearing shall be had; upon the return of such notice served, to the county clerk of such county, he shall thereupon enter the same upon his issue

docket as an appeal case, and the same shall be heard in its order by the court; *provided*, that if the case cannot be determined by the circuit court, in term time, within one month after the termination of such election, the judge of the circuit court may hear and determine the same at chambers, as soon thereafter as may be practicable, and shall make all necessary orders for the trial of the case and carrying his judgment into effect; *provided*, this section shall not apply to precinct officers."

The notice by which this proceeding was commenced states the time and place of hearing, as follows:

"You are also notified that the above matter in contest will be heard before Hon. W. W. Upton, at the court house, in Oregon City, in said Clackamas County, at the next term of the circuit court for said county, or as soon as said judge will hear the same, as provided by law in such cases.

"Dated June 17, 1870."

The defendant being required to show cause why the motion should not be granted, claims:

First, that the notice is defective and void, because it states the time of the hearing in the alternative.

And secondly, that the defendant cannot be required to appear and try the cause at a time earlier than that specified in the notice.

The notice is the commencement of the proceeding. It is in the nature of original process, and the court acquires jurisdiction by its services and return.

This being a special proceeding in which the court acquires jurisdiction in a mode specially pointed out by the statute, and not by the ordinary process of the court, the mode so prescribed must of course be strictly pursued, or the proceeding is void.

Hence, a notice that does not state a definite time for the hearing is of no avail, it being one of the requisites of the notice that it should "state the time and place."

If a notice of proceeding of this kind should state that the contest would be heard upon one or the other of two designated days, the notice would be fatally defective. But where a definite day is named, and an indefinite alternative

is also referred to, for instance, by adding "or as soon thereafter as the same can be heard," the indefinite words are often rejected as surplusage.

If in this notice the indefinite words are rejected as surplusage, the time stated is "at the next term of the circuit court for said county," and may be construed to mean the next term appointed by statute. If the notice is so construed, the time is named with sufficient certainty, and the first objection is obviated.

But the second objection presents a more serious obstacle to the proposed order.

It was argued that the language of the statute which gives the judge at chambers power to "make all necessary orders for the trial of the cause and carrying its judgment into effect," is sufficiently comprehensive to include this order.

I am satisfied that the purpose of that clause is to give to the judge at chambers power to do whatever the court could do in term time. By the terms of this clause power is conferred on the judge and not on the court. It authorizes only orders necessary for the trial of the cause, or for carrying the judgment into effect. That is, such orders as the court could make if in session, because a court having power to try a cause may make all orders necessary for the trial. The context also indicates this purpose.

It would be a forced construction to hold that the legislature intended, by this language, to confer on the judge power to do what it would not be proper for the court to do if in session.

The real question is whether the court, or the judge acting in place of the court, can require the defendant to appear and try the cause at a time earlier than that stated in the notice.

I am not aware of any case under the statute in which a similar question has arisen.

Reference has been made to the cases tried in Clackamas County in 1868, but this question did not arise in either of those cases.

In one or more of those cases, and also in this case, application was made before any notice was served, to the

circuit judge, to have a time set for the hearing. Both in the cases tried in 1868 and in this case, the judge declined to make any order before the notice was served, on the ground that the court has no jurisdiction of the cause, and the judge has no power to make any order in such a case until the time of the hearing is appointed by the plaintiff, and stated in the notice and the notice served. In this case, and in those cases also, the judge expressed to the counsel for the plaintiff making the application, that he was willing to attend at Clackamas County and hear the cause as soon as the jury cases then pending at the June term of the court in Multnomah County should be disposed of.

In the cases tried in 1868, the plaintiffs named the 6th of July for the hearing, but the jury cases in Multnomah not being concluded at that time, the hearing was continued until the 16th of July, at which time the trial was brought on.

This case differs from those above referred to in this particular; in those cases each of the plaintiffs, in his notice, named an early day for the hearing, and the time of the hearing was postponed; in this case, the plaintiff, in his notice, named, as the time for the hearing, the next term of the court (that being the fourth Monday in October), and it is now proposed to take the case up for trial at an earlier day.

It was a first impression that this difficulty might be obviated by calling a special term, inasmuch as the notice named "the next term" as the time for the hearing; but it is a fatal objection to that solution, that unless the notice is construed to name a known and certain time, the notice will be void for uncertainty. It must be construed as referring to the term already appointed, or it is insufficient as a notice.

One of the controverted points in this connection is the construction of the word "thereafter" in the proviso above quoted. If it refers to the period, one month after the election, as is claimed by the plaintiff, it does not follow that if the plaintiff names a day of hearing later than that moved for, the case can be taken up before the time appointed by himself. If that is the proper construction of the statute, I

think the act of appointing a later day is a waiver of any claim to an earlier hearing. It is not very clear whether the statute is to be construed to mean, after that period, or after the time stated for the hearing, or after a term of the court. Under either construction, to order an earlier day would be inconsistent with that part of the statute which requires the original notice to state the time. It would of course necessitate a new notice of the time, and yet it is necessary to the jurisdiction, that the time of the hearing should be stated in the original notice. This is a different proposition from that of continuing a cause.

The language of the proviso is sufficient, I think, to authorize the judge, if the case cannot be heard in term time within a month, to hear it as well after the day named in the notice as on that day. But it is at least very doubtful whether the court or judge is authorized to compel the defendant to appear before the time stated in the notice.

No authority was cited on the argument presenting a case where such an order has been made, and, after considerable search, I am unable to find a case where a defendant has been required to appear at an earlier day than that named in the original process or notice served upon him.

The notice is in the nature of a summons. The plaintiff need not return it or file it with the clerk until the day named for the hearing, and the court has no jurisdiction of the case for any purpose until it is filed with the clerk.

I cannot think that the statute is intended to authorize a party to name the day of hearing, and afterwards have an exclusive right to move for an earlier day. Until the plaintiff chooses to return the notice, the defendant cannot be heard on such a motion, for the court has no jurisdiction to hear any motion in the case until the return.

It seems to me an unreasonable construction, and one not warranted by the language of the statute, to hold that the party who is required to name the time of the hearing in his original notice can, without any new cause shown, have an order naming another and earlier time.

The motion should be denied.

CIRCUIT COURT FOR CLACKAMAS COUNTY.—AT CHAMBERS, AUGUST, 1870.

ARTHUR WARNER, PETITIONER, v. JOHN MYERS,
RESPONDENT.

MANDAMUS.—The office of a writ of mandamus was the same at common law as it is now declared by the code, and it cannot be used as a means to determine ultimate right to an office.

IDEM.—An answer denying the legality of the election of the petitioner to an office which he holds will not abate the writ.

CERTIFICATE OF ELECTION.—The certificate of a board of canvassers of election returns is the record of what was decided, and it is the legitimate evidence of the decision.

DECISIONS—WHEN BINDING.—When a tribunal or board, no matter how inferior its jurisdiction or limited its power, proceeds within its jurisdiction, and determines a matter which it is authorized by law to decide, its decision, even if erroneous, is binding until it is reversed.

APPEAL—ITS EFFECT ON THE DECISION.—The fact that an appeal has been taken does not affect the conclusive nature of the decision while it remains unreversed.

IDEM—PLEADING.—The petitioner having plead the decision of the canvassers in his favor, and that he was in possession of the office, an answer declaring that a majority of the legal votes were cast for the defendant, was struck out on motion.

PLEADING.—An answer declaring that a contest was pending to determine the legality of the election was also struck out.

SHERIFF.—When a former sheriff is served with a certificate, in pursuance of section 983 of the code, his powers cease, and a contest pending does not stay the effect of serving the certificate.

Johnson & McCown, for the petitioner.

Lansing Stout and S. Huelat, for the respondent.

UPON filing the petition for a mandamus in this case, it was ordered that the defendant show cause why a writ should not issue. At the time appointed, the parties appeared before the judge at chambers, and the defendant filed an answer to the petition. The judge being of opinion that the petition should specifically state what property and prisoners were withheld or retained by the defendant, the petition was amended in that particular, and the defendant filed his answer as before. After argument, an alternative writ was allowed.

The facts alleged in the petition and writ are substantially: That Arther Warner, the petitioner, was duly elected sheriff of the county of Clackamas, on the sixth day of June, 1870; that prior to the thirtieth day of June, 1870, he was qualified as such sheriff, and has since entered upon the duties of said office. That the defendant, John Myers, was the acting sheriff of said county, prior to the election and qualification of said petitioner. That said petitioner having been elected as aforesaid, and having qualified as such sheriff, the county clerk of said county of Clackamas, on the second day of June, 1870, made and gave to said petitioner a certificate of that fact, and that both on said second, and on the fifth of July, 1870, he served said certificate on said defendant; that more than one day had elapsed since such service, and that the defendant had refused and still refuses to deliver to said petitioner the jail of the county, its appurtenances, and the property of the county therein, the prisoners confined therein, and the process designated in the petition. The petition then proceeds to enumerate the property, prisoners and process retained by the defendant.

The defendant's answer, which was first made to the petition, and was afterwards by consent used as an answer to the writ, omitting the formal parts, is as follows:

The said defendant for answer to the petition of Arthur Warner, plaintiff, denies that on the sixth day of June, 1870, said Warner was duly and legally elected sheriff of Clackamas County. But on the contrary, this defendant avers that on the sixth day of June, 1870, a majority of all the legal votes cast at the general election held in said county of Clackamas, were given for him, the said defendant, for the said office of sheriff and he was then duly and lawfully elected such sheriff.

Defendant denies that said plaintiff, since the election and prior to the thirtieth of June, 1870, was duly qualified, and that he has since then legally entered upon the discharge of his duties as sheriff as aforesaid. And for a further answer to the petition of plaintiff, the defendant says that there is now pending in the said circuit court a proceeding wherein

this defendant contests the right of the said plaintiff, Arthur Warner, to hold the said office of Sheriff of Clackamas County.

The petitioner moved to strike from the answer the parts relating to the defendant's receiving a majority of the legal votes and being lawfully elected, and that in relation to a contest pending.

The motion was granted, and the plaintiff offered in evidence the certificate of election issued to him upon the canvass of the votes; his oath of office endorsed on the certificate and the endorsement thereon, his official undertaking, with affidavits of justification of sureties, and its endorsement of approval and of the filing; and the certificate of the clerk of the county of his having qualified after his election. He also proved by his own oath that he had been acting in the capacity of sheriff of the county from the fifth of July to the present time, and rested his case. The defendant proved that he (the defendant) had been in possession of the county jail continuously during the year past, and rested.

Johnson & McCown, for the petitioner.

Kelly & Reed and Lansing Stout, for the defendant.

UPTON, J. The petitioner's right to a peremptory mandamus in this case, depends upon the question of law whether an incumbent of the sheriff's office can prolong his term, or entitle himself to hold over beyond the two years fixed by law, by giving a notice, as provided on page 707 of the general laws, that the election will be contested.

This question is clearly settled by legislative acts, which will be referred to hereafter.

It may be well before examining the provisions of statute that define the rights and duties of these parties, to consider what is the office of the writ of mandamus, and to notice the question of practice presented by the motion to strike out part of the answer.

The office of this writ at common law was precisely what it is now declared to be by our code. (3 Black. Com. 110;

1 Tiff. 114; 6 Ba. Ab. 418; *et seq.*) It is "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." (Code, sec. 583, p. 297.)

That this proceeding cannot be used as a means of determining the ultimate right to the office, is settled by authority and is conceded to be law, by both the petitioner and the defendant.

In proceedings by writ of mandamus, it is often necessary to determine as a question of fact whether or not a particular person is in the actual possession of an office, or in other words, whether he is exercising its functions; but this is a matter entirely different from determining whether such person is entitled to the office.

So too it may, be and frequently is necessary to determine whether or not a particular person is an officer *de facto*; trying that question is not a trial of the right to the office in any sense that makes it necessary to resort to *quo warranto*.

After a person has been declared elected by a competent tribunal, it may still be necessary, upon mandamus, to determine as a preliminary or collateral question whether he has been so declared. His right to sue may depend upon it. In such case, admitting proof of the fact is not such a trial of the right to the office as would compel a proceeding in the nature of *quo warranto*. The decision declaring him elected, then offered in evidence, may have been made in a proceeding in the nature of *quo warranto*, previously tried and determined. It would be absurd to hold that in every future proceeding where the petitioner alleges that he holds the office and the allegation is denied, the issue presented is such that it cannot be tried except by a similar proceeding by *quo warranto*.

Those parts of the answer included in the motion are not pleadable in this case, unless a defendant can by setting up error in the decision of the canvassing officers, or by pleading that there is a contest pending to try the title to the office, either change the character of this proceeding from *mandamus* to a proceeding in the nature of *quo warranto*, or abate this proceeding until it shall be determined who is rightfully entitled to the office.

If the petitioner is entitled to this writ it is because there is now a duty to be performed which the law has enjoined, and not because of any duties that may hereafter arise.

If one who has a good cause for contest can prolong his hold on the office by giving the notice, one who has not ground of contest can do the same thing. It can never be treated as a thing known, whether or not he has good grounds for contest, until the contest is terminated. The mode of conducting the contest must be the same where there is not sufficient grounds, as where the claim of the party giving the notice is meritorious.

It will be seen by provisions of statute hereafter quoted, that the act or duty sought to be enforced by this proceeding does not depend upon the ultimate rights involved in the answer.

It will not be contended that a defendant can, by filing such a pleading, change the character of this proceeding to a proceeding in the nature of *quo warranto*; and no authority has been produced, and it is believed none can be found for the position that upon filing such an answer, the writ should be abated or dismissed.

It might upon the same reasoning be claimed that in an action of forcible entry and detainer, in which the title to real estate can not be a material issue to be tried, the action must be dismissed whenever the defendant pleads title to the premises where the force was used. The law and the reason for the rule of practice are the same in that case as in the case under consideration. The plea is irrelevant because neither the wrong of the alleged injury, or the remedy, is dependent on the ultimate right of either party to the office or to the land in question.

The argument in favor of retaining that part of the answer, when distinctly stated, amounts to this: The decision of the board of canvassers is subject to review; until it is reviewed, it is impossible to know whether it is correct; until it is known to be correct, no court has power to compel the former incumbent of the office of sheriff, to deliver to the present incumbent, the jail and other property of the county. The argument overlooks the fact that it was the

duty of the board of canvassers to decide whether or not the petitioner was duly elected. That was a question for that board to decide, according to its judgment, and it is not in the power of the circuit court to direct such a board what decision it shall make, or to question the correctness of its decision in a proceeding by mandamus. (2 Denio 192; 20 Wend. 658.)

A reference to the various statutory provisions touching the merits of the case, will also show conclusively that the matters included in the motion are not material, and do not constitute a defense in this proceeding.

The statute concerning elections, (Sec. 31, Gen. Laws, p. 705), makes it the duty of the county clerk, when the votes are canvassed, "to make out a certificate of election to each of the persons having the highest number of votes for members of the Legislative Assembly, county and precinct officers respectively, and deliver such certificate to the person entitled to it."

By section 9, general laws, p. 823, the sheriff "must qualify by filing with the county clerk of the county wherein he is elected, his certificate of election, with an oath of office endorsed thereon." * * * "and also give and file the undertaking hereinafter provided."

By section 983, p. 393, "When a new sheriff is elected or appointed, and has qualified, the county clerk shall give him a *certificate of that fact* under his seal of office." ●

"Whenever *thereafter*, the new sheriff is authorized by *statute* to enter upon the duties of the office, he shall serve such certificate upon the former sheriff, from which time his powers cease, except when otherwise specially provided." By section 984, "within one day after the service of the certificate upon the former sheriff, he shall deliver to his successor the jail of the county, with its appurtenances, and the property of the county therein."

It cannot be maintained that unless the decision of the board of canvassers is free from error, its decision is no decision, or that it may be disregarded before it is reviewed and reversed by a competent tribunal.

When a tribunal or board, no matter how inferior its

jurisdiction, or limited its power, proceeds within its jurisdiction, and determines a matter which it is authorized by law to decide, its decision, even if erroneous, is binding until it is reversed. (*Van Wormer v. Aldermen of the City of Albany*, 15 Wend. 262; *Morewood v. Corporation of New York*, 6 How. Pr. 386; 32 N. Y. 281; 29 How. Pr. 281; 11 Abbott Pr. 9; 35 Barb. 308; 6 Barb. 479; 37 Barb. 520.)

If the board or the tribunal is required by law to decide, and acting within its jurisdiction, it proceeds to make the decision, that decision is binding until reversed, although the board or court erred as to the law or mistook the facts, or misjudged as to the weight of evidence. (*Lawrence v. Houghton*, 5 John, 128; 6 Hill, 114; 4 Kern, 329; 4 Seld. 137; 32 N. Y. 281; 44 Barb. 321.)

"The fact that an appeal has been taken does not affect the conclusive nature of the decision while it remains unreversed. (*Sage v. Harpending*, 49 Barb. 166; 34 How. Pr. 1).

‡ The certificate required to be made at the time of the canvass is the record of what was then decided, and it is the legitimate evidence of the decision.

When afterwards the clerk was called upon to certify to the fact that the new sheriff had qualified, if he had the proofs before him, the act of certifying was a duty specially enjoined by law. He was acting within the scope of his jurisdiction. He had before him the decision of the board of canvassers, and whatever else material to the question there was on file in his office, and his duty required him to proceed on the evidence before him. It cannot be maintained that his certificate was no certificate in case there had been error in canvassing the vote.

The law creates a board of canvassers, with full power to decide upon the questions presented. The county clerk is required to make the record of their decision by certifying the result. This certificate, when endorsed with the oath of office, is required to be filed with the county clerk, and becomes a part of the files of that office. The law above quoted specially defines what is "qualification," and declares what acts shall constitute the qualification of a sheriff.

When the county clerk has made the certificate of the fact of qualification which the law compels him to make, and when the preceding term has expired, there remains but one thing to be done to cause the general powers of the former sheriff to cease. That is, to serve the certificate upon him.

Special provisions are made by which he retains power to do certain acts; for instance, to finish the execution of process partially executed, but otherwise his powers end by operation of law. By force of the statute, when such a certificate is served in pursuance of the statute, a legal effect is produced in the very act of service.

It will not alter the fact, should the same man who was the former sheriff, afterwards by action or by special proceeding in pursuance of the statute, attack the decision of the canvassers in the proper tribunal and show that it ought to have been rendered in his favor, and thus obtain a decision in his favor that he ought to have been declared elected. He will thereupon be placed in office; but the proceedings of the person who acted in the interim as sheriff under the erroneous certificate will be valid and binding. The powers which the reinstated sheriff will thereafter exercise are not those that ceased on presentation of the certificate, but they are the powers with which he becomes vested by virtue of his re-election and qualification.

By operation of law the powers of the one person ceased, and another person became sheriff *de facto*. If he is afterwards ousted by the judgment of the court, his opponent takes by virtue of the election, and not by his right to hold over.

To sustain the defendant's position it is necessary to disregard these provisions of statute; to treat the certificate of election as false before it is reviewed, and to hold in the face of, and in opposition to, the decision of the board created by law to decide the question, that the defendant's successor is not elected as certified.

Who is to determine that the certificate is false, without a trial of the question?

It is evident from the language of these statutes, that the

legislature had in contemplation the confusion which would arise if the former sheriff could upon any pretext disregard the decision of the board of canvassers, and remain in office during a pendency of a contest for the right of the office.

It was to avoid any pretense that a sheriff could hold over beyond his term on a claim that the votes were not correctly canvassed by the constituted authority, that it is provided that upon the service of the certificate his powers cease. It is not enacted that his powers shall cease if the election is in all respects legal, or if the votes are correctly canvassed, or if no appeal be taken, or after the appeal is determined; but it shall cease when the certificate is served.

The explicit language of the act is well chosen to express in the most positive manner that there shall be no stay of proceedings, but that the transfer shall be immediately made.

It does not alter the case that the former sheriff and the one who proposes to contest is one and the same person.

The defendant does not claim, in this case, as his own successor. He does not allege that he has qualified. He bases his right solely on being the prior incumbent. If he had received a majority of the votes, and obtained the certificate of election, that would add nothing to his right in the office until he qualified. It is then immaterial to the present right of possession whether he or some third person is the contestant. He has no higher right of possession or of holding over, than he would have if some other person had given notice of a contest. If the defendant can hold over, under the facts here presented, it is because the petitioner was not elected, and not because the defendant was elected. He could with the same reason hold over if some other person was the contestant.

The same reasoning that will justify this defendant in holding over, will justify the former sheriff in holding over in all cases where there is a contest, until it shall be settled by final judgment of either the circuit or supreme court which of the contestants is entitled. And this whether the former sheriff is a party to the contest or not.

It is difficult to imagine what more decisive language the

legislature could have employed to express the intent that the former incumbent should not hold over because of a contest.

The answer in this case does not deny that the certificate mentioned in the writ was issued by the clerk, and it does not deny its service upon the defendant. It contains nothing from which it can be concluded that the canvassers or clerk lacked jurisdiction to perform the acts devolved upon them. The denials of the answer are a denial "that the plaintiff was *duly and legally* elected sheriff" of, etc., and a denial that the plaintiff "was *duly* qualified, and that he has *legally* entered upon the discharge of his duties as sheriff aforesaid."

If these are to be treated as presenting issues of fact, the first issue is determined by the certificate of the board of canvassers, a certified copy of which was produced. That he was duly qualified was shown not only by the certificate of the clerk, but by the production of the certificate of election, and the petitioner's oath of office endorsed thereon, with its filings and endorsements and his official undertaking with its indorsements. And it was proved that the petitioner was, and for some time had been, the acting sheriff of the county. If, then, the certificate of election issued under section 31, p. 705, of the code, can be read in evidence in a court of justice, it is proved that the petitioner was elected as alleged.

This certificate, until the decision it records is reversed, is as clearly the proper evidence of the decision, as is the certificate the clerk is required to make under section 41 of the same act.

No provision of statute has been referred to, that directly or by implication indicates that the certificate of election is inoperative or to be held in abeyance in case of a contest. Yet it is a general feature of our statutes that whenever a stay of proceedings is deemed proper, special provision is made in each particular case pointing out a mode to obtain such stay. On the other hand, the special provisions to the contrary of a stay of proceedings above quoted, are made with particular reference to the sheriff's office only.

If the statute was less clear on this point, the following considerations would be of great force to indicate that the law should be as the legislature has already seen cause to declare it. The petitioner, being an officer *de facto*, cannot proceed by *quo warranto* against the defendant. (Code, sec. 354.) He, and through him the public, are therefore without a remedy if he cannot proceed by *mandamus*.

If he is obliged to wait for his contestant to proceed by action under section 354, the contestant can choose his own time for commencing the action. If the proceeding is to be by the special statute for contesting elections, found on page 707 of the code, the holder of the certificate cannot reasonably commence it, because the decision is already rendered in his favor. If it is to be commenced by another, that other may commence it by simply serving a notice, without any oath or affidavit of merits, and the contestant serving the notice may fix his own time for the hearing, putting it early or late to suit his own convenience. After the trial in the circuit court, an appeal lies to the supreme court.

If such a contest stays proceedings and renders the certificate of election of no effect pending the contest, it will have that effect when the contest is without merits, as well as when the contestant is in the right, and, as is above shown, as well when a third party contests as when the former incumbent is the contestant. Such a system would enable the former incumbent, by serving a notice that the election would be contested, or by procuring another to serve such notice, to exclude his successor from whatever of the office he could retain in his possession or personally control, to the embarrassment, if not to the preventing of the execution of the law, and to the subversion of order.

Such a construction of the statute would enable the former incumbent, by instituting a contest, whether in person or through the means of some other person who had received votes, to prolong his hold upon the office far into, if not through, the term of his successor. A rule which would to so great an extent subject the substantial rights of the public and of individuals to the caprices or honest errors of

one person, would present an anomaly in jurisprudence; and it is contrary to the express provisions of the statutes enacted to define the rights and duties of the outgoing and incoming sheriff.

A peremptory *mandamus* should be allowed.*

IN THE CIRCUIT COURT FOR WASCO COUNTY.—AT CHAMBERS,
JULY, 1870.

JOHN DARRAGH, PLAINTIFF, v. JAMES M. BIRD,
DEFENDANT. †

ELECTION CONTEST.—PRECINCT.—An elector should vote for county officers only in the precinct where he resides.

PARDON.—A pardon by the executive does not restore to a person convicted of felony the rights of an elector. ‡

RESIDENCE.—Every person must have some fixed place of residence, or must labor under a disability that neither the law nor the courts can relieve. The mere passing in and out of a precinct will not establish a residence, although the person's occupation may be such as to make it inconvenient to vote at any other place, or if he has no fixed place of residence.

CHALLENGE.—Whenever a person is challenged by a legal voter, unless such challenge is withdrawn, he has no right, unsworn, to vote; nor can the judges receive such vote.

CLOSING POLLS.—After the hour for closing the polls, they cannot be opened again.

RESIDENCE.—An intention to remove immediately after the election does not amount to a change or loss of residence; there must be a union of act and intention.

BURDEN OF PROOF.—A party attacking a voter who has voted must show that he is disqualified.

EMPLOYEES OF THE GOVERNMENT.—Although residence cannot be gained or lost by reason of the person's presence or absence, while employed in the service of the United States, yet one so employed may change his residence.

REJECTED VOTES.—All rejected votes should appear on the poll book in the manner prescribed in sec. 18, p. 701, of the compiled laws.

NATURALIZATION.—One who has obtained his final citizen papers, becomes a voter at the time of being naturalized.

* Affirmed at the September term of 1870.

† By stipulation the cases of *Woods v. Fitzgerald and Wingate*; *Mays v. Fitzgerald and Wingate*, and *McFarland v. Holland*, were submitted on the same evidence.

‡ Reversed. See *Wood v. Fitzgerald et al. post*.

3	229
3	244
3	229
37	438

CHALLENGE—PROOFS.—Judges of election have no right to reject votes without any evidence that they are illegal, the voter not being challenged, or having taken the prescribed oath. If they desire other proofs beyond the voter's sworn statement, the evidence must be produced at the time he votes.

ELECTION CONTEST—WILL OF MAJORITY.—In a contest, the will of a majority of the legal voters, as expressed by their votes, must be carried into effect.

The facts appear in the opinion filed.

WHITTEN, J. This is an action brought to contest the election of the defendant to the office of sheriff of Wasco County, Oregon; to which office defendant claims to have been elected at a general election, held in said county on the sixth day of June, A. D. 1870. Plaintiff claims that he received a greater number of the legal votes at said election, for said office, than did the defendant, and is therefore entitled to said office. Plaintiff alleges that J. B. Blanpied, J. Liddy, L. Manning, T. H. Williams, W. C. Smith, J. S. Becky, and divers other persons, whose names are mentioned in plaintiff's complaint, voted at such election for the defendant for the office of sheriff in said county, and that such votes were illegal, and should not have been counted for the defendant; that said persons were not, at the date of their voting, *bona fide* residents of Wasco County or the precincts therein. Plaintiff further allèges that at the time and place of holding said election in said county, Peter Runey, R. Graham, Wm. McKay, and divers other persons whose names are set forth in the complaint of plaintiff, were qualified electors of Wasco County, and legally entitled to vote; that said persons did appear at the polls and offer their votes for this plaintiff for said office, and were prevented from voting at such election for this plaintiff, through the illegal acts of the judges of said election. Plaintiff claims that said illegal votes as received, recorded and counted for the defendant, should not have been counted for him, and that the votes which were offered for plaintiff, and by the judges of election rejected, should be counted for plaintiff; and that if the illegal votes which were received were deducted from the whole number of votes which de-

fendant received for said office, and the votes which said judges really rejected were added to plaintiff's vote for said office, it would entitle plaintiff to said office. Plaintiff claims that there is one more vote counted for defendant than should have been counted, and there is one vote which should have been counted for plaintiff that was not counted for him.

The defendant, for answer, denies that plaintiff is entitled to said office, or that he received a greater number of the legal votes at said election for such office than did the defendant. Defendant admits that J. B. Blanpied, J. Liddy, T. H. Williams and others voted at said election in said county for him for said office, but denies that said votes were illegal—denies that Peter Runey, William McKay and others were on said day of election prevented from voting for plaintiff through the illegal acts of the judges of said election; denies that such persons were at said date *bona fide* residents of Wasco County, or that they were legally entitled to vote; denies that said votes so offered should have been recorded and counted for the plaintiff. Defendant admits that there was one more vote counted for him than should have been, but denies that there was one less counted for plaintiff than should have been counted; and, for a further defense, defendant alleges that on the day of said election in said county, Jesse Snooks, E. Kinney, Wm. Kelly, Gustave Hines, and divers other persons named in defendant's answer, voted for plaintiff for said office, and that said persons were not, at the date of their so voting, *bona fide* residents of Wasco County, and the precincts therein, and that such votes were illegal and should not have been counted for the plaintiff. Defendant then sets up some votes which were rejected, and claims that such votes would have been thrown for defendant had they not been rejected, and that they should be counted for defendant. To this, plaintiff replies, making a complete denial of all the affirmative allegations set up in the answer.

Having thus briefly stated the issues in this case, they will be considered in the following order:

1st. The names of R. Henderson, E. Kinney and M.

Meng—Kinney voting for plaintiff, the other two for defendant—are submitted on an agreed statement. Henderson, it is admitted, was a resident of East Dalles precinct on the day of election, and that he voted in Sutton's precinct. Sec. 17 of Article II. of the constitution of Oregon, declares that "all qualified electors shall vote in the election precinct in the county where they may reside, for county officers," etc. Henderson's residence being admitted to be in East Dalles precinct on the sixth day of June, that being the day on which the election was held, he could not have legally voted in any other precinct for county officers, and there being no controversy as to where he did vote on that day, his vote for the office of sheriff, that being a county office, was illegal and should not be counted for the defendant. E. Kinney voted for plaintiff in East Dalles precinct and had declared his intentions to become a citizen of the United States less than one year immediately preceding the election. By reference to sec. 2, Art. II, of the constitution, it will be seen that to entitle a person of foreign birth to vote at an election, he must have declared his intention to become a citizen of the United States one year immediately preceding such election, conformably to the naturalization law. Kinney's case does not come within this provision, and he had no right to vote. M. Meng, who voted for defendant in East Dalles precinct, is a person, as appears by the agreed statement, who had been convicted of the crime of arson, and had been an inmate of the penitentiary of this state, and had been pardoned out before the expiration of his sentence. Sec. 14, Article V, of the constitution, gives to the governor of the state the power to grant pardons for offenses of this character. There can be but little doubt that the framers of the constitution, in giving this power to the governor of the state, were inclined to be as merciful toward the offender as would be consistent with public policy and public good. I cannot conceive it was the intention of those men to ever restore a person who had become so degenerate as to permit his passion to influence him to the commission of a crime involving both his civil and political condition to all the rights and privileges

he previously held when an upright man. It is an act of mercy, of which no one complains, that the constitution empowers the executive to pardon, to blot out the offense for which one is imprisoned and restore him to his civil rights; but in order to prevent those who had any pride in their political rights from the commission of crime, they are made to know and understand that if they do so far lose their self-respect and the respect of others, there is no power in our constitution, our laws, or in the governor of the state, that can restore them to their political rights. Meng was, on election day, politically dead and had no right to vote.

2d. G. H. Kimberlin, G. Masterson, Z. Smith, Wm. Bramlette, J. McMullin, W. A. Scroggins, A. A. Straw, L. Manning, F. Bird, T. H. Williams, J. Liddy, T. Brannan, T. Penny, W. C. Smith and J. S. Becky are the names of persons who voted at said election, and that said votes were recorded and counted for the defendant. It is claimed by the plaintiff that some of those persons voted out of the precinct in which they resided; that others are not residents of the county, as will appear as they are taken up in their order. Defendant claims for them, that, as they have no fixed residence, and as the constitution does not require a person to be a resident of the precinct any particular time, they have a right to say that the precinct in which they may chance to be on the day for election is their residence for the time being, and that they can vote.

In passing upon the right of these persons to vote, I lay this down as the law, that every person must have some fixed place of residence—must have a domicil, or else he must labor under a disability that neither the law nor the courts can relieve. Residence is a matter of intention and act—it may be gained and retained without expense or trouble; it cannot be lost by mere temporary absence. It is claimed that these are persons whose occupations are such that they cannot make it convenient to be at a certain place on the day of an election. Suppose they cannot, then they must content themselves by voting for just such officers as the law entitles them to do, and for none other. It is

true that irregularities without number have been permitted, or rather indulged in, and it is time they were corrected; and it makes no difference whether persons have voted ignorantly or willfully. If ignorantly, it is time they knew better; if willfully, it is time they were taught to obey and respect the law. For a person to claim that he has a right to vote wherever he may chance to be on election day, and that, if in a precinct other than the one he was in, he could claim the former as his residence, is not only contrary to law, but to common sense. All general laws are intended to confer the greatest good upon the greatest number, and to attempt by specialty to legislate, so as to meet individual wants and circumstances, would be preposterous. Apply these principles to the facts of the case, of those above mentioned, and what will be the legal conclusion? Kimberlin voted in Sutton's precinct. From the evidence, it is my opinion that Kimberlin had no such residence in Sutton's precinct, as would entitle him to vote for county officers—Kimberlin admitting that if he had been in the Dalles, or elsewhere on the day of election, he would have claimed that other place as his residence. The mere passing in and out of a precinct, will not establish a residence—it is nothing more than an occupancy; the person for the time being simply an inhabitant. George Masterson voted in Sutton's precinct, and his condition is very similar to that of Kimberlin, and the evidence about the same. His residence, if he had one at all, in my opinion, was in Antelope precinct—and he had no right to vote for county officers in the precinct in which he did. Z. Smith voted in Antelope precinct. The evidence shows that Smith came into Wasco County in February last, and then declared that he intended to vote in this county, and make this county his residence. This, I think, was sufficient to entitle Smith to vote, though he might have been temporarily absent afterwards, and that his vote was properly received and counted for defendant. William Bramlette voted in Sutton's precinct, and swore in his vote. This, of itself, is sufficient to entitle him to vote, until the contrary is shown. There is evidence of his having left some of his effects in said pre-

cinct, and that he had a contract in said precinct partially finished.

The evidence also shows that he had left the precinct, and only returned on the morning of the election, and then voted and again left. There is nothing in the evidence to show that he did not intend to return when he left the first time, and the presumption corroborated by the act of his coming back, is strong in his favor that he intended to come back, and his vote was rightly counted. J. McMullin voted in Fifteen Mile precinct; that the dividing line between Fifteen Mile and Tygh precincts is the dividing ridge between Fifteen Mile and Tygh creeks; that McMullin lives on waters of a stream that runs into Tygh creek, but that it is some distance north of the divide, Fifteen Mile creek being north of Tygh creek. The evidence shows that the stream on which McMullin lives runs through a gap in the divide between Fifteen Mile and Tygh, thus breaking the ridge which is the natural boundary between said precincts. I think the true rule in determining the boundary line between the two precincts where it is broken by a gap, as shown from the evidence, would be to draw a line from one point of the ridge to the other across the gap. To do this would leave McMullin north of the ridge, and consequently in Fifteen Mile precinct. From the facts here shown, McMullin's vote was properly received and counted in that precinct for defendant. W. A. Scroggins, L. Manning and A. A. Straw voted in John Day precinct. There is no doubt in my mind but that Scroggins, Manning and Straw were, at the date of their voting, residents in Antelope precinct, and that they had no legal right to vote in any other precinct for county officers, and such votes should not be counted for defendant. From the evidence, I have no doubt that Frank Bird was, at the time he voted, a resident in John Day precinct, and that his vote was properly recorded for defendant. T. H. Williams, a boatman, with no fixed residence, voted in Mosier's precinct—a case in every way similar to Kimberlin's. J. Liddy voted in West Dalles precinct; had removed to Portland with his family in last March, leaving no traces of residence whatever behind him;

came to West Dalles in the afternoon of day of election, voted and returned to Portland next day. I cannot think that Liddy had any residence in Wasco County on the day of election; certainly he had none in law, and if not, he had no legal right to vote, nor should it be counted for the defendant. T. Brannan and T. Penny voted in West Dalles precinct. The evidence as to their residence is somewhat unsatisfactory. Their votes are attacked by plaintiff, and it devolves upon him to show affirmatives that they had no right to vote. There is doubt in my mind whether they were *bona fide* residents of Wasco County on the sixth of June; and I think there is sufficient reason to warrant me in rejecting them. W. C. Smith and J. S. Becky voted in the West Dalles precinct. From the evidence, there is no doubt but at the date of their voting they were residing in Grant County, and were here temporarily purchasing goods for transportation. It is my opinion they had no right to vote. J. B. Blanpied voted in East Dalles precinct. Whether Blanpied had resided in the state six months next preceding the sixth day of June last, or not, will make no difference in determining his right to vote, as other facts plainly settle this question. But were this the only evidence upon which to determine it, I should, from Blanpied's own statement, have no hesitancy in deciding the case. When Blanpied offered his vote, he was challenged by a legal voter. That challenge was insisted on, and never withdrawn, Blanpied positively declaring he would not be sworn, and the judges as positively refusing to swear him. Under these circumstances he voted. The law so plainly settles this question, that to say anything further than that Blanpied had no right whatever to vote would be superfluous. (Code, p. 700, sec. 13)—Whenever a person is challenged by a legal voter, unless such challenge be withdrawn, he has no right, unsworn, to vote; nor can the judges, without disregarding the law and their own obligation, receive such vote. The law then gives no discretion in the matter—they must reject it.

R. Myers voted in West Dalles precinct. There is no question raised as to Myer's qualifications as a voter. It is claimed that he voted after the polls had been closed. The

law fixes the time for opening and closing the polls. (Code, p. 699, sec. 11.) Myers knew what time the polls closed, and if for any cause he stayed away until they were closed, it was his own fault. The polls could not be opened again for his accommodation. In this case the evidence is somewhat conflicting as to whether the polls had been ordered closed at the time Myers voted, or not. After a careful examination of the testimony, it is my opinion that the polls were closed before Myers voted—the evidence greatly preponderates in favor of this opinion, and comes from witnesses who are least liable to be influenced by their prejudices.

For the defense it is claimed that H. Gulick, C. Cruver, C. Dunlap, George and Isaac Chapman, G. Hines, C. Fales, Wm. Murphy, T. Shelly, J. Cunningham, A. Strong and J. M. Thompson have not resided in the state or county the necessary length of time prior to the election to entitle them to vote. It is my opinion that, from the acts and declarations of the parties, except Thompson, as shown by the evidence, they were on the day of election *bona fide* residents of this state and county, and as such were entitled to vote—G. Hines is here in the capacity of a minister of the Gospel, and as such had been here about eight months prior to the day of election. I will make no comment in his case. There can be no doubt but that he had a right to make the Dalles his place of residence, and to vote there, if he chose to do so. C. Fales—there is but little objection made as to him. He no doubt had a right to vote. Murphy had been temporarily absent for his health. He swears he intended to return when he went away; and the fact that he did return is the very best evidence of his intention to do so. His residence was not affected by his temporary absence. He had a right to vote. T. Shelly came here as a teacher; came from one of the counties west of the Cascades. Soon after his arrival he declared his intention to make this his residence—so declares it now—was in the county more than ninety days prior to the day of election, and was clearly entitled to vote. Cunningham had been in the state and county about two years. It is said that because he had a family

in New York he could not gain a residence here. This position is not correct. Suppose a man leaves his family in California and comes to Oregon, seeking for a place to which to remove his family. He is here six months, has made arrangements for the removal of his family hither. An election is held, his family has not arrived, may never arrive. Circumstances that he could not foresee have changed his intentions; he sees a plan where he can better his condition—may have made up his mind to remove thither. In the meantime an election is held. Would the fact that he had made up his mind to remove to some other place deny him the right to vote? Certainly not. Such circumstances may cause any of us to change our residence, for we will all do so when we think we can better our condition, and without affecting our right to vote. Strong stands on his own evidence; he voted, and the presumption is that he had a right to vote. He swears this was his residence. This, with the fact that the party attacking the legality of his vote, has failed to show anything to the contrary, is satisfactory to my mind that he had a right to vote. Gulick, Dunlap, the Chapmans and Cruver, it is said, removed from Washington Territory, or at least that the two Chapmans and Dunlap did, and have not been in the state the required time to entitle them to vote. I think the evidence shows satisfactorily that they have resided in the state more than six months prior to the sixth day of June last, and were entitled to their votes. As to Gulick, Cruver and Thompson, it is claimed that on the day of election they were residents of Washington territory, and therefore had no right to vote. As to the two first, I have no hesitancy in declaring the legality of their votes. I have serious doubts whether it was Thompson's intention, when he moved across the river, into Washington territory, to any longer claim Oregon as his residence, and the evidence being unsatisfactory, I shall, for the purpose of this action, refuse to count it for plaintiff.

I. L. Curry, J. Snooks, F. Zeller, A. J. Brown and C. Sergeant, it is claimed, are persons who voted out of the precinct in which they resided. There is very little difficulty in deciding as to Snooks, Zeller, Sergeant and Curry.

Sergeant voted in East Dalles precinct. The evidence shows that on the sixth day of June, the day of election, he resided in that precinct, and his vote should stand.

Snooks and Zeller both voted in East Dalles. The evidence shows their residence on that day to be in West Dalles. Their votes should not have been recorded for any of the county officers. Curry voted in Antelope precinct. I think from the evidence his residence is in Sutton's precinct, where he should have voted. Brown is one of those cases where a person slept in one precinct and boarded in another; but, in giving his testimony as to his residence, he says "I think where Thomas Smith lives is my residence." Smith lives in West Dalles; Brown voted in East Dalles. If Brown was in doubt as to which precinct he resided in, he should have informed himself in time—it is too late now. I think from Brown's own evidence he should have voted in West Dalles precinct. The rule which I have applied to the case of Strong and others—that the party attacking a voter must show in what respect he is disqualified, or the vote must remain undisturbed, will apply to the case of M. Cain, who voted in Fifteen Mile precinct, and to C. Gonzales, who voted in Tygh precinct, and to La Fraties and Hansel and Huerta, who voted in East Dalles precinct. B. P. Cardwell, Jacob Fritz, and others of like circumstances, it is claimed, are disqualified from voting, for the reason that they are in government employ. Many have fallen into this error for the reason that they make no distinction between an employee of the government and a soldier, seaman or marine. Sec. 4 of article II. of the constitution says: "For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States or of this state." Sec. 5 of the same article says: "No soldier, etc., shall be deemed to have acquired a residence in the state in consequence of having been stationed within the same, nor shall he have the right to vote." The question of residence being one of act and intention, the framers of the constitution left the matter entirely to the discretion of the parties themselves, They say we will

neither enlarge or restrict the right of persons in this respect, but leave it with them to elect as to where they will claim their residence. The difference between sections 4 and 5 is this: In the 4th the language is "for the purpose of voting," etc., evidently intending that the person himself should make the place of his choice his residence. Sec. 5 is: "No soldier," etc., "shall be deemed," etc., giving to him no discretion in the matter. *People ex rel. E. R. Budd v. W. Holman* (28 Cal. 123) is a case in point, and very similar. Suppose that a person residing in Wasco County were to go to Salem, in Marion County, to work on a state building, and were to remain there two or three years, would it be contended that he had acquired no residence in that county, because he had been an employee of the state. The fact that he is such employee does not deprive him of his right to elect whether he will retain residence in Wasco County, or whether he will abandon it and adopt another, and the principle is precisely the same whether he be an employee of the state or of the United States. B. P. Cardwell and Jacob Fritz had as much right to vote the state and county ticket on the 6th day of June for state and county offices as the oldest residents of Wasco County had. Another question arises, which may as well be settled here as elsewhere. Code, p. 700, sec. 14, says: "If any person so offering to vote shall take such oath, his vote shall be received, unless it shall be proved by evidence, satisfactory to a majority of the judges, that he does not possess the qualifications of an elector, in which case a majority of said judges are authorized to reject such vote." The only point to be determined here is, must a person, whose vote is rejected for any cause, be entered on the poll books as such? There are some grounds for the opinion, that a rejected vote need only be entered on the poll book, with the names of the persons for whom he wishes to vote, when he is challenged for disloyalty, as will be seen by reference to Code, p. 701, sec. 16, viz: that if a person's vote is challenged for the cause mentioned in sec. 13, and he takes the oath required, and is then rejected, that his vote need not be recorded, etc. I think that, for the protection of the voter,

as well as the person for whom he wishes to vote, the better opinion is, that all rejected votes should appear on the poll book in the manner prescribed in sec. 18, p. 701 of the Code of Oregon. Any other rule than this would give to the judges of election the power of electing to office any person they might prefer, by rejecting the votes of all those who were opposed to the candidate of their choice. Unless some record be made of rejected votes, they would be entirely lost to the person for whom they were intended, as will appear from an examination of that class which is claimed in this action as legal voters and were prevented from voting through the misconduct and illegal acts of the judges. In passing upon this point, now raised, I cannot, from the law as understood, and to which I shall refer, consider those rejected votes in a manner that will change the result of said election; and it makes no difference whether they were properly or improperly rejected. The only relief I can afford is to carry into effect the express will of a majority of the legal voters, as indicated by their votes. (Code, p. 707, sec. 41.) In a contest, the only thing that can be considered by a court or judge is the illegal votes. There is nothing which authorizes a court or judge to open up the polls, and count, for one of the contestants, votes that have been rejected and left unrecorded by the judges of election. *Webster v. Brynes* (34 Cal. 273) is a case in point. Courts and judges are powerless in a case of this kind, yet I deem it but justice to those who were improperly rejected, for there can be no question but that some of those offering to vote had a legal right to vote, to refer to some plain provisions of law, that the legal voters may in future be protected from both ignorance and fraud—for it is a lamentable fact that our elections are becoming corrupt, and the proud boast of the *right of suffrage* of American citizens an empty sound. Our elections should be conducted honestly, openly and fairly. It is the foundation of a republican government, and should be kept pure—and yet men dare to tamper with this sacred right with impunity. All good men desire that this right should be kept inviolate. The code, page 696-707 (inclusive), declares in unmistakable language,

the manner of holding and conducting elections, and the legal rights of electors. Under the provisions of sec. 13, if a man, who has solemnly sworn to carry into effect such provision, can quiet his conscience by saying he did not intend to declare to a person, who offered to vote and was challenged, the qualifications of an elector, unless asked to do so by such voter, he should not be allowed to sit on an election board in any capacity.

H. Crellish, E. Bernard, E. A. Willis and P. McLaughlin, submitted, on agreed statement, voted for Darragh for sheriff, and their votes afterwards rejected all persons of foreign birth, no question as to the time they had resided in Wasco County. McLaughlin declared his intentions to become a citizen of the United States in 1851. Section 2 of Art. II of the constitution is sufficient as to his case; his vote should be counted. Crellish, Bernard and Willis obtained their final citizen papers less than six months prior to the election. I cannot see why a person of foreign birth, having proper residence, upon obtaining his final citizen papers, is not as much entitled to vote the day after he has obtained them, as the natural-born subject would be who attains his majority one day before an election. Their votes should be counted. R. Graham, D. L. Reynolds, J. S. Morgan, P. Runey, J. Bamford, A. Biddle, J. Sullivan, J. G. Paddleford, W. Tarrant, and others. It is unnecessary to discuss this class further, as reference has already been made to them, it appearing so palpable that no one need be mistaken unless he desired it. There is not a shadow of a doubt of the right of those persons to vote.

Wm. McKay, Battise, the Delords, Russi, and others of mixed blood, of whose legal right to vote I have some doubts, I will not decide (since it does not affect the result in this case) as to whether their votes were properly or improperly excluded.

Having thus carefully considered this case, I find:

That the judges of the election had no right to record votes upon the poll books and then refuse to count them, there being no evidence that they were illegal.

That if judges of the election desire other proof of the

competency of a voter, beyond his sworn statements, the evidence must be produced at the time he votes. An elector must have some precinct as a residence in preference to all others, to enable him to vote for county officers, and he must vote in such precinct. A person refusing to be sworn, when challenged by a legal voter, has no right to vote.

A person offering to vote, and being ready to take the oath prescribed by law, his vote should be received, unless it appears that he does not possess the qualification of a voter, and even then must be recorded as a rejected vote.

A person of foreign birth is entitled to vote from and after the date of his final citizen papers, having proper residence.

An employee of the government may, if he choose to do so, acquire a residence the same as any other citizen, and when so acquired, has a right to vote.

That in a contest the will of a majority of the legal voters must be carried into effect, as expressed by their votes. That, of the legal votes for the office of sheriff—John Darragh, 296—the votes of H. Crellish, McLaughlin, Willis, Bernard and Fritz, rejected by the judges, are now counted for said Darragh, and the votes of A. J. Brown, J. Snooks, F. Zeller, J. L. Curry and E. Kinney, having been counted by the judges for him, are here rejected. J. M. Bird received for said office 313 legal votes. The votes of J. Liddy, G. H. Kimberlin, G. Masterson, W. A. Scroggins, L. Manning, H. A. Straw, T. H. Williams, T. Brannan, T. Penny, W. C. Smith, J. L. Becky, M. Meng, J. B. Blanpied and R. Myers, counted for said Bird, are here rejected. Bird having received a greater number of legal votes for said office than did Darragh, it is hereby ordered and adjudged that he have and hold said office, and that he have judgment against the plaintiff for his costs and disbursements.

It is further ordered and declared that the costs and disbursements in this case be taxed at one fifth of the whole amount in all the five contested cases submitted. That in the case of *C. McFarland v. M. Holland*, contest for the county clerk, submitted on stipulation that the filings and

proofs in the case of *Darragh v. Bird*, stand for the pleadings and proofs in this case. Of the legal votes, C. McFarland received for said office, 303; H. Crellish, E. Bernard, E. A. Willis, J. Fritz and P. McLaughlin, votes which the judges of election refused to count for plaintiff, are here counted, and the votes of A. J. Brown, E. Kinney, J. Snooks, F. Zeller and J. L. Curry, counted for plaintiff, are here rejected. That of the legal votes cast, A. Holland receives for said office, 304; the votes of R. Henderson, G. Masterson, G. H. Kimberlin, W. A. Scroggins, L. Manning, A. A. Straw, T. H. Williams, J. Liddy, T. Brannan, T. Penney, W. C. Smith, J. S. Becky, M. Meng, J. B. Blanpied and R. Myers, were counted for defendant, and are here rejected. That Holland having received a greater number of the legal votes for said office than did McFarland, it is therefore ordered and adjudged that he have and hold the same, and that he have judgment against plaintiff for his costs and disbursements. It is further ordered and decreed that the costs and disbursements in this case to be taxed, shall be the one fifth of all the costs and disbursements in all the five contested cases submitted.

That in the case of *R. Grant v. Geo. Ruch*, contest for the office of county treasurer of Wasco County, Oregon; stipulations the same as in the case of *McFarland v. Holland*, of the legal votes cast, Grant received 296; that the votes of R. Henderson, G. Kimberlin, G. Masterson, W. A. Scroggins, L. Manning, A. A. Straw, T. H. Williams, J. Liddy, T. Brannan, T. Penney, W. C. Smith, J. S. Becky, M. Meng, J. B. Blanpied and R. Myers, were counted by the judges of election for plaintiff, and are here rejected; and that George Ruch received for said office of the legal votes, 311; the votes of H. Crellish, E. Bernard, E. A. Willis, P. M. McLaughlin and J. Fritz, were rejected by the judges, and are here counted for Ruch, and the votes of A. J. Brown, J. L. Curry, J. Snooks, F. Zeller and L. Kinney, counted for defendant, are here rejected. Ruch having received a greater number of legal votes for said office than did Grant, it is ordered and adjudged that he have and hold said office, and that he have judgment against said plaintiff

for his costs and disbursements. It is further ordered and decreed that the costs and disbursements to be taxed in this case, be one fifth of all the costs and disbursements in the five contested cases submitted.

In the case of *E. Wood v. Fitzgerald and Wingate*, contest for the office of county commissioner—stipulations the same as in the case of *McFarland and Holland*. Wood received of the legal votes for the said office, 311—the votes of H. Crellish, E. Bernard, E. A. Willis, J. Fritz and P. McLaughlin, not counted for Wood by the judge of election, are here counted for him, and the votes of A. J. Brown, J. L. Curry, J. Snooks, F. Zeller and E. Kinney, counted for him, are here rejected. That of the legal votes for said office, E. P. Fitzgerald received 301, and E. Wingate, 298—the votes of R. Henderson, G. H. Kimberlin, G. Masterson, W. A. Scroggins, L. Manning, A. A. Straw, T. H. Williams, J. Liddy, T. Brannan, T. Penney, W. C. Smith, J. S. Beck, M. Meng, J. B. Blanpied and R. Myers, counted for defendants for said office, by the judges of election, are here rejected. Wood having received a greater number of votes for said office than Fitzgerald or Wingate, and being duly elected to said office, it is therefore ordered and adjudged that he have and hold said office, and that the clerk of Wasco County issue to the said E. Wood a certificate of his election within ten days from the filing hereof, and that the certificates of election to said office heretofore issued to E. P. Fitzgerald and E. Wingate be each declared null and void as against the right of said Wood to said office, and that he have and recover from said defendants his costs and disbursements herein, and that the same be adjudged to be one fifth of all the costs and disbursements in the five contested cases submitted.

In the case of *R. Mays v. E. P. Fitzgerald and E. Wingate*, contest for the office of county commissioner—stipulations the same as in the case of *McFarland v. Holland*, of the legal voters for the said office, Robert Mays received 303—the votes of H. Crellish, E. Bernard, E. A. Willis, J. Fritz and P. McLaughlin, not counted for plaintiff for said office, are here counted; and the votes of J. Snooks, F. Zellter, J.

L. Curry, E. Kinney and A. J. Brown, counted by the judges for plaintiff, are here rejected—that E. P. Fitzgerald received of the legal votes for said office 301, and E. Wingate received 298—the votes of R. Henderson, G. H. Kimberlin, G. Masterson, W. A. Scroggins, D. Manning, A. A. Straw, T. H. Williams, J. Liddy, T. Brannan, T. Penny, W. C. Smith, J. S. Becky, M. Meng, J. B. Blanpied and R. Myers, counted for Fitzgerald and Wingate, for said office, are here rejected. Mays having received a greater number of the legal votes than did Fitzgerald or Wingate, was duly elected to said office. It is therefore ordered and adjudged that he have and hold said office of commissioner, and that the clerk of said county of Wasco issue a certificate of election to the said Mays within ten days from the filing hereof—and that the certificates of election to said office heretofore issued to E. P. Fitzgerald and E. Wingate be each declared null and void as against the rights of said Mays to said office—and that he have and recover from said defendants his costs and disbursements herein, and that the same be adjudged to be one fifth of all the costs and disbursements in the five contested cases submitted.

Wilson, for plaintiffs.

*Hummason & Gates, for defendants.**

CIRCUIT COURT FOR THE COUNTY OF BAKER.—VACATION AFTER
OCTOBER TERM, 1870.

PAUL L. SHUMWAY AND BRO., PETITIONERS, v. THE
COUNTY OF BAKER, RESPONDENT.

ASSESSMENT.—COUNTY COURT.—The county court has no jurisdiction or authority to correct errors made by the assessor in the valuation of property.

IDEM.—The proper tribunal by which such corrections are made is composed of the assessor and county clerk.

* This case was taken to the supreme court on appeal. See *Wood v. Fitzgerald et al post.*

DURING the regular October term of this court for the year 1870, "Paul L. Shumway and Bro." submitted their verified petition, praying for a writ of review to the county court of Baker County, to correct alleged errors of said court in refusing, upon motion and affidavits of petitioners, to correct the assessment of their taxable property, made by the county assessor in August last. The prayer of said petition was granted, and a writ issued in due form to the said court, which writ was duly returned, with transcript of the proceedings and record properly certified. Thereupon a motion was made by defendant's counsel to quash and dismiss the writ. The motion was resisted, and after argument, the cause was taken under advisement, etc.

W. B. Lasswell, district attorney, and *I. D. Haines*, for the motion.

D. M. McKinney, *contra*.

McARTHUR, J. From the record certified up to this court the following facts appear: That on August 7, 1870, the assessor of Baker County, in the discharge of the duties of his office, required one of the copartners of the firm of Paul L. Shumway & Bro. to furnish him with a verified list of all the real and personal property of said firm subject to taxation in said county; that on August 9, said list was furnished by Paul L. Shumway & Bro., with their own estimate of the value of their property. It appears therefrom that the property returned was valued at \$6,160.00, and that their indebtedness was \$5,954 $\frac{1}{100}$, leaving \$270 $\frac{3}{100}$ as the amount of their taxable property; that on August 12, the assessor assessed said firm in the sum of \$10,270 $\frac{3}{100}$, and his reasons for so doing appear in marginal notes upon the statement returned by the petitioners: that on September 6, at a regular term of the county court of Baker county, the petitioners appearing by counsel, moved the said court, sitting as commissioners, to correct said assessment by reducing the same ten thousand dollars, the said motion being based on affidavits; that counsel appeared for the county, and resisted said motion, and after hearing the arguments of

counsel, the court dismissed the motion, and all proceedings in said matter, for the reason that it had no jurisdiction to hear and determine the same, and this judgment of the county court the petitioners charge as error.

For the purposes of this case, it is unnecessary to consider the contents of the affidavits accompanying the said motion, or the statement of the assessor, written upon the schedule of petitioners' property.

Two points are raised in that portion of the petition which may be regarded as the assignment of errors:

First. That the county court erred in holding that it had no jurisdiction of the subject matter of the application of the petitioners, and in dismissing the same; and

Second. That the county court erred in not striking from the assessment roll ten thousand dollars charged to the petitioners by the assessor, in addition to the amount of their taxable property as claimed and returned by them.

As the second is embraced within the first they will be considered conjointly. Since the decision of the supreme court of this state in the case of *The Oregon Steam Navigation Company v. Wasco County*, 2 Or. 206 *et seq.*, there has been but little room left for controversy upon the propositions of law arising in cases of the nature of the one now under consideration. In that case it was held that "in section 24, chapter 53, page 900, of the code, the legislature gave the county court its authority over the assessment roll. Change in valuation is not hinted at. The court has power to correct the roll; that does not include the power to change assessments, for the words change and correct are not equivalent in meaning. It may change descriptions of property, 'and may make any other alterations or corrections in such roll as it shall deem necessary to make the same conform to the requirements of this chapter (53).' What does chapter 53 authorize or require? Title 1, declared what property is taxable; title 2, where and to whom such property is assessable; title 3, manner of making assessments; and in section 15 of that title, is the only reference to appraisal, and then it requires the assessor 'to appraise it (the taxable property) according to the provisions of the

statutes relating thereto,' evidently referring to some other statute where such manner was indicated, and to none other than chapter 2, page 628, of the code. That valuation was an act fixed elsewhere, it was not one of the requirements of chapter 53, but was one of chapter 2 alone. When made, it is final, unless provision is expressly made somewhere for its revision." The law has provided a time, a place and a tribunal for the revision of assessments, and the correction of errors in the valuation of property. Section 4, chapter 2, pages 628-9, of the code, provides that "each assessor shall give three weeks public notice in some newspaper, printed in his respective county; if there be no such newspaper, then in some newspaper in general circulation in his county, or by posting up notices in six conspicuous places in his county, setting forth that, on the last Monday of August, the assessor will attend at the office of the county clerk of his county, and with the assistance of said clerk will publicly examine the assessment rolls, and correct all errors in *valuations*, descriptions or qualities of lands, lots or other property, and it shall be the duty of persons interested, to appear at the time and place appointed, and if it shall appear during such examination that there are any lands, lots, or other property assessed twice, or assessed beyond their actual value, or assessed in the name of a person not the owner thereof, or any lands, lots, or other property not assessed, the county clerk and assessor shall make the proper connections." In view of this provision of the code the supreme court, in the case above cited, expressly declared that "the only authority for revision in *valuation* we deem is vested in the assessor and clerk, on the last Monday in August, at the clerk's office." Then and there any one feeling aggrieved by the acts of the assessor in the appraisal or valuation of his or her property, must be and appear, and take such steps as may lead to a correction of all errors of that character. If the aggrieved party fails to appear before this tribunal,—for it is a tribunal, and the only one known to the law as having original jurisdiction and authority to correct errors made by the assessor in the valuation of property, and declared to be such in *Rhea v. Umatilla County*, 2 Or. 300,—

then he or she must suffer the penalty of his or her own neglect, and be obliged to acquiesce in the statement of the valuation of his or her property as returned by the assessor. Errors committed by the clerk and assessor in revising the assessment rolls may be reviewed by this court, as was also held in *Rhea v. Umatilla County*.

From the facts presented by the record, and the law as enacted by the legislature and interpreted by the supreme court, the only conclusion I can reach is, that the county court has no jurisdiction or authority to correct errors made by the assessor in the valuation of property. Hence the county court of Baker county, in so deciding, and in dismissing from its consideration the proceedings instituted by petitioners, did not err. It follows that defendant's motion should prevail and the writ be dismissed with costs.

CIRCUIT COURT FOR THE COUNTY OF UNION—VACATION AFTER
NOVEMBER, TERM, 1870.

JAMES M. GRAYDON, PLAINTIFF, v. DOUGLAS THOMAS
AND CASWELL LAXTON, DEFENDANTS.

DEFAULT—ENTRY OF JUDGMENT BY THE CLERK.—In cases falling within the provisions of sec. 246 of the code, the clerk has power to enter judgments upon defaults, without judicial direction or intervention.

IDEM.—In so doing he exercises ministerial and not judicial functions.

IDEM—INFORMALITIES.—Judgments when so entered, will not be opened up, set aside, or disregarded because of slight informalities.

THE complaint filed October 18, 1870, alleges that defendants are partners, that as such they purchased from plaintiff one wagon on May 3, 1870; that they agreed to pay plaintiff therefor one hundred and sixty dollars (\$160), and that they failed to so do. Summons and copy of complaint were duly served by proper officer October 19, 1870, in Union County, Oregon, upon defendant Laxton. On November 1, 1870, the clerk of the circuit court, upon application of plaintiff's attorney, entered a default against defendant, he having

failed to answer, and thereupon entered a judgment in favor of the plaintiff for \$160 and costs, and ordered that execution issue therefor against the joint property of both the defendants, and the separate property of the defendant Laxton. November 7, and during term time defendants appeared by counsel and filed motion to open up said judgment, for the reason that the clerk had no authority to enter the same.

Baker & Lichtenthaler, for the motion.

J. H. Slater, *contra*.

MCARTHUR, J. In the argument upon the motion, the defendants' counsel urged *generally*, that the clerk had no legal authority to enter a judgment upon a default, for that in so doing he usurped the function of the court or judge, and *particularly*, that if he had such authority, he erred in entering a judgment herein, for the reason, that as the complaint alleged a joint and not a several liability on the part of the defendants, and the record disclosed the fact that one only of the defendants had been served with summons, a judgment entered upon default against the party served only is void. In deciding upon the first point raised I have carefully considered the premises, and am of opinion that the rule laid down in the case of *The Providence Tool Co. v. Prader*, (32 Cal. 634) should prevail. In that case, upon a statute similar to our own, it was held that the clerk, in entering default, exercises no judicial functions, but acts merely in a ministerial capacity. This ruling affirmed the decision in *Kelly v. Van Austin* (17 Cal. 565), and also that in *Wilson v. Cleveland* (30 Cal. 198). In pronouncing the opinion in the case first cited, the chief justice used the following language, the legal and logical force of which will not, at least after due reflection, be denied: "It is sometimes difficult to determine whether an act is judicial or ministerial. Judging, and thereupon determining in a particular way is, in a general sense, the exercise of a faculty that is of a judicial quality; and, in the largest sense of the term, all determinations that are the result of judgment

are judicial. But the term, when applied to proceedings pertaining to a court of justice, is limited within a less extended scope, and those acts are denominated judicial which properly pertain to the judge alone in the exercise of his office. If the defendants fail to answer within the time required by the statute (and expressed in the summons) the clerk, upon application of the plaintiff, is required to enter the defendants' default, and thereupon enter a judgment against him for the amount specified in the summons." In such cases the clerk must ascertain from the complaint that the action is one specified in sec. 246 of the code of civil procedure—for money or damages only—and further, he must ascertain when and where the summons was served, and whether the defendant be in default. The laws of this state have invested in the clerk the authority to determine these matters, as the necessity of a determination of them is a condition precedent to the exercise of the further power reposed in him by law to enter the default, and thereupon to enter a final judgment for the amount prayed for in the complaint, and specifically demanded in the summons. These duties of the clerk falling within the letter and spirit of the law, have generally been denominated ministerial in their nature, as contradistinguished from judicial. (Vide cases above cited and also *Wallace v. Eldredge*, 27 Cal. 497; *Glidden v. Packard*, 28 Cal. 654; and *Bond v. Pacheco*, 30 Cal. 533.) When a party is served with a summons and complaint and makes default (which by his own act he could have prevented), he virtually, although not technically, makes confession of judgment. Especially is this the case in actions for the recovery of damages or money only. The clerk being the arm of the court, and an officer in whom the law reposes certain defined powers, in entering a default and a judgment thereon, acts simply as the agent of the law in placing upon the records of the court a judgment already declared to be such by statute. Hence the conclusion arrived at upon the first point presented is, that in cases falling within the statute (vide civil code, sec. 246) the clerk, as such, has power to enter a judgment upon a default without judicial direction or intervention, and that in so doing he exercises ministerial and not judicial functions.

As to the other point raised in the argument, I am of opinion, that, inasmuch as the record discloses the fact that the defendants are jointly, and not severally liable, the proper course for the court or the clerk, acting in consonance with, and obedience to sec. 59, subdivision 1, of the code of civil procedure, was to enter such a judgment as could be enforced against the joint property of both the defendants, and the separate property of the defendant served. It matters very little as to the precise language used by the clerk in making the journal entry of a judgment, provided the various steps taken in a case clearly appear, and provided also that so much of the judgment entry as authorizes the issuance of an execution, or other process, is clearly and distinctly set forth without ambiguity or doubt. In such cases, though slight informalities appear in other parts of the judgment entry, it should not be opened up, set aside, or disregarded. The entry in this case comes within this rule, and is conformable to the statutes. It follows that the motion should be denied.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1870.

B. WELLMAN AND J. M. PECK v. J. B. HARKER.

APPOINTMENT OF A RECEIVER.—The court refused to appoint a receiver, where it was not shown that there was danger that the partnership property will be ultimately lost.

INJUNCTION.—Where a motion for an injunction is submitted on complaint and answer, and the answer denies all the equities of the bill, the injunction should not be granted.

THE allegations of the complaint are, that about February 1st, 1867, the plaintiffs and the defendant entered into a partnership, under the name and style of "Harker & Co.," in a general mercantile business at Portland, Oregon, for a period of one year. That they carried on said business for the said year, when, by a further agreement, they continued the time of the duration of the partnership, until the end of

1868, at which time the regular business of said firm ceased, by mutual consent of parties. The terms of the partnership were, that the plaintiffs were to furnish and own one half of the capital stock, and the defendant the other half, and the profits and losses were to be shared in the same proportion. The plaintiffs put into the firm \$14,493.22, and the defendant about the same amount. The defendant was the agent of the firm, and managed the business at Portland, made sales, received the money, and kept the books.

The defendant drew out of the firm, and appropriated to his own use, \$8,377.40. The firm is indebted to third parties to about \$12,000.

“The defendant has pretended to control the books, accounts, assets, and property of the firm, and has collected, and still is collecting, large sums of money due to the firm. And though often requested by the plaintiffs to *settle and adjust the matters of said firm*, as between the members thereof, and to pay back to these plaintiffs the capital they put into it, *or* allow them the use of their share of the property belonging to it, yet the said J. B. Harker has refused to settle and adjust said partnership accounts, *and refused to collect* from the firms and establishments in which he has an interest, outside of the firm of Harker & Co., the large amount of money due to said firm of Harker & Co., and refuses to pay back the large sums he has drawn out of said firm and applied to his own use.”

That there are large sums due to the firm. That the defendant is using money belonging to the firm in outside speculations attended with great risk, to-wit: among other things, in a mill. That the defendant is indebted to plaintiffs \$16,000.

It is also stated in the complaint, that the defendant is interested in other firms named, and that he “wrongfully drew out large sums from the firm” for the use of other firms in which the defendant was interested, and allowed said firms to become indebted to Harker & Co., to-wit: Bushbee, Livermore & Co. to \$16,207 04; Snodgrass & Co., \$8,610 64; Exclsior Mills, \$1,631 38.

The plaintiffs pray for an injunction, the appointment of a receiver, the appointment of a referee, and for general relief.

An answer is filed, which directly meets and denies the allegation that defendant has received and appropriated to his own use money of the firm; denies that the defendant has control of the books and the accounts of the firm, and denies that the defendant has refused to account and settle. And avers that the credit given to the various firms mentioned in the complaint was given with the plaintiffs' knowledge and consent.

The plaintiffs demur to the answer, on the ground that it does not state facts to constitute a defense. On this state of the pleadings, the case came on to be heard on the motion of the plaintiffs for an injunction and for the appointment of a receiver.

Logan, Shattuck & Killen, for the plaintiffs.

Mitchell & Dolph, for the defendant.

UPTON, J., announced the following decision :

It does not appear from the complaint whether the plaintiffs have made any effort to have the demands due to the firm of Harker & Co. collected; nor that the defendant has neglected any duty in that respect. There is therefore no foundation laid for appointing a receiver in order to expedite the collections. To justify appointing a receiver or granting an injunction, because of the funds charged to be in the defendant's hands, it should appear that there is danger that the money will be ultimately lost to the plaintiffs. It is not alleged that the defendant is insolvent, nor does it appear affirmatively by the complaint that there is any danger of ultimate loss to the plaintiff. The answer denies that the defendant "has applied to his own use any sums drawn out of said firm," and alleges that the crediting the other firms mentioned, was done with the knowledge and consent of the plaintiffs.

I think there is not good reason shown for an injunction or for the appointment of a receiver. Where the motion is

submitted on complaint and answer, and the answer denies all the equities of the bill, an injunction should not be granted.

The answer I think denies all the equities attempted to be set up in the complaint, unless it be the charge that the defendant had allowed certain firms in which he is interested to become indebted to the firm of Harker & Co. In regard to that matter, it does not appear that those firms are insolvent, nor that this defendant has been requested to collect the money from them; and the answer avers that the credit was given to them with the plaintiffs' approval. I do not think a sufficient cause is shown, either for appointing a receiver or granting an injunction.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1870.

HENRY LUDWICK v. JOSEPH WATSON.

PROMISE TO PAY THE DEBT OF ANOTHER.—Where a promise to pay a debt is founded on a new and original consideration of benefit to the promiser, the subsisting liability of the original debtor is no objection to the recovery.

THE plaintiff alleges that he had become an accommodation indorser for one Huguinin, on a note of \$100, which he paid under compulsion and was about to commence an action against Huguinin, and to sue out an attachment against his goods to recover the amount. And was about to attach a certain restaurant which the defendant, Watson, and said Huguinin owned or claimed. "That thereupon, in consideration that said plaintiff would forbear to attach said restaurant, said Watson promised and agreed to pay said sum. That thereupon said plaintiff gave up all claim against said Huguinin, and has looked to said Watson alone for payment."

He alleges a demand and failure to pay.

The answer, under information and belief, denies the allegations in regard to the note, denies that the defendant

was interested in the restaurant, and in the same manner denies that the plaintiff was about to attach the property. The defendant also "denies that he has agreed to pay to the said plaintiff the sum of \$100, or any other sum for said Hugiunin."

The case was tried before a jury, and the proofs sustained the allegations of the complaint and tended to show that, at the time of the threatened attachment, the defendant and the said Hugiunin were keeping the said restaurant as partners.

The defendant moved for a non-suit.

J. W. Whalley, for the defendant.

The rule as laid down by Chancellor Kent in *Leonard v. Vreden*, 8th John. 29, is not of universal application, and is not the true rule. (*Williams v. Boyington*, 3 Mctf. 396; 11 Mass. 365; 5 Cush. 488; 8 N. Y. 207.)

The new consideration must be such as to shift the actual indebtedness to the new promisor; so that as between him and the original debtor, he is bound to pay the debt as his own; the latter standing in the relation of surety to him. (*Kingsley v. Balcom*, 4 Barb. 131.)

Caples & Moreland, for the plaintiff, cite Edwards on Bills and Notes, p. 223-224; Parsons on Contracts, 387.

BY THE COURT, UPTON, J. This question was very fully argued, and the subject carefully examined, in the case of *Hedges v. Strong, Adm'r*. In that case this court held the rule to be as stated in *Leonard v. Vreden*, and I see nothing in the cases cited by the defendant in conflict with the doctrine there laid down, except the ruling in *Kingsley v. Balcom*, 4 Barb. 131. In that case Judge Sill cites *Farley v. Cleveland*, 4 Cow. 432, as supporting his opinion. The latter case purports to be a review of the leading cases on this subject, and refers to some case in which it has been said to be a material question whether, "the original debt was still subsisting," but the case does not seem to support the view expressed in *Kingsley v. Balcom*; on the contrary, *Savage, C. J.*, says: "In all these cases, founded upon a

new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or the original debtor, *the subsisting liability of the original debtor* is no objection to the recovery." The motion for non-suit must be overruled.

The defendant offered some evidence tending to show that there was no consideration moving to the defendant. The charge to the jury was the same as was given on this point in the case of *Hedges v. Strong, Adm'r.*

The plaintiff had a verdict for \$109.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1870.

NELSON NORTHROP v. THE CITY OF PORTLAND.

CONTRACT—CONSTRUCTION.—Where an estimate had been previously made, and the defendant contracted for removing earth, in the words, "For grading as per estimate on file, thirty cents per cubic yard," *Held*, that *prima facie* the estimate must be taken as correct, and the burden of proof is on the plaintiff to show that there is a mistake in the estimate.

Caples & Moreland, for the plaintiff.

C. A. Dolph, City Attorney, for the defendant.

THE plaintiff contracted to do "all the grading required by a plank roadway sixteen feet in width in front of the block abutting on Second street, between Madison and Harrison streets," in the city of Portland; for which the city agreed to pay him "as follows, to wit: for grading as per estimate on file, thirty cents per cubic yard."

At the making of the contract, there was on file a written estimate, made by the city surveyor, stating the grading at a given number of yards. This was set forth in the complaint, and it was alleged that the estimate was erroneous and incorrect. And the complaint specified a greater number of yards actually included in the grading and necessarily removed by the plaintiff. The action is for compensation

for the number of yards which the earth alleged to have been removed exceeds the estimate.

The defendant demurred that the facts stated did not constitute a cause of action, and the demurrer was overruled.

The defendant answered, denying the alleged error in the estimate, and setting up certain city ordinances, and certain usages in regard to such kinds of work in the city, and averring an agreement to pay according to the estimate only.

On the trial it was shown that the plaintiff had frequently done work for the city under contracts containing similar provision in regard to the mode of estimating the work; that it was the customary mode of letting contracts, to first cause the amount of earth to be estimated by the city surveyor, and to place the written estimate on file before making the contract; and that in his previous transactions the plaintiff had settled with the defendant upon the basis of the estimates so filed, without any subsequent or other measurement of the work.

The following instruction asked by the defendant, the court declined to give to the jury:

"If you find that by the agreement the amount of compensation was to be calculated and determined by the estimate then on file, the verdict must be for the defendant."

Upon the principal points in the case the court instructed as follows:

If you find that it was an established usage known to the plaintiff at the time of making the contract, to contract with reference to an estimate previously made and filed, showing the number of yards of grading, and to rely upon such estimate, and to settle the compensation by it without any further measurement or computation, you will take the written estimate offered in evidence as fixing the plaintiff's compensation; unless you are satisfied that the city surveyor made a mistake in making that estimate. In that case the burden of proof is on the plaintiff to show the mistake.

By the terms of the contract the parties must be presumed to have bargained under the belief that a correct estimate had been made; and with an intention that the compensation would be made in pursuance of the estimate.

It was the intent of the parties that the plaintiff should be paid for all the earth required to be removed, and it was their intent that no further measurement should be necessary to ascertain the amount. *Prima facie*, the estimate must be taken as correct, because the parties so intended and so in substance bargained, and for this reason the plaintiff, who asserts that it is incorrect, has the burden of proving his assertion.

The defendant had a verdict.

CIRCUIT COURT FOR CLACKAMAS COUNTY, NOVEMBER TERM, 1870.

STATE OF OREGON v. CHARLES CUTTING.

SELLING LIQUOR WITHOUT LICENSE—TIME.—On an indictment for selling liquor without a license, where there is no question as to the statute of limitations, the time when the liquor was sold is not material. But where the name of the person to whom the sale was made is stated in the indictment, the proof must show that a sale was made to the person named.

BURDEN OF PROOF.—The burden is on the defendant, to show that he is licensed.

PAYMENT.—If one sells liquor, it is not material whether it is paid for.

IDEM.—It would not be a violation of the statute for one to give away liquor without any expectation of compensation.

SUBTERFUGE.—But if there is an understanding, express or implied, that the party who obtains the liquor will pay for it, or will purchase something else because of it, the act is disposing of the liquor within the meaning of the statute.

THE defendant was indicted under the statute which makes it a criminal offense for any person to "barter, sell or dispose of" spirituous liquors without a license. On the first trial the jury failed to agree, and the case coming on a second time, the defendant's counsel requested that the instructions be given in writing.

The evidence tended to show that the defendant kept a small grocery and variety store, and that it was his practice to give away liquor to those who made purchases from him, and that he frequently sold a stick of candy for 12½ cents and gave the purchaser a drink of liquor.

A. C. Gibbs, district attorney.

Charles Warren & M. F. Mulkey, for the defendant.

UPTON, J. The following instructions were given to the jury :

Gentlemen of the jury : In a case of this kind, if the defendant claims to be licensed, it is his duty to prove that he has been licensed, and if he fails to do so, the jury must hold that he is not licensed.

In this case it is necessary for the prosecution to show that the defendant sold or disposed of spirituous liquors in less quantity than one quart; and to make out a case, the prosecution should show that liquor was disposed of by the defendant to Woodcock, the person named in the indictment; but the time when the liquor was disposed of is not material, as there is no question of the statute of limitations in the case; and it is not material, under this indictment, whether the liquor was whisky or some other kind of spirituous liquor. If the defendant has disposed of whisky by selling candy for more than the ordinary price and giving away the liquor, with an intent to evade the law which requires a license, he committed the offense created by this statute. If the prosecution has proved beyond a reasonable doubt that the defendant has so disposed of whisky to Wilson Woodcock, in less quantity than one quart, it is your duty to render a verdict of guilty.

A defendant is to be presumed innocent, in a criminal case, unless and until the proof establishes his guilt beyond a reasonable doubt.

But if the evidence satisfies your minds beyond a reasonable doubt that the defendant sold or disposed of spirituous liquor, to the party named in the indictment, in less quantity than one quart, the presumption of innocence is destroyed. It is sufficient if the prosecution has proved such sale on any one occasion, and it is immaterial on what day the sale took place.

If the defendant gave a drink of liquor and a stick of candy for 12½ cents, for the purpose of evading the law, it is

immaterial whether the defendant took up the money from the counter or not. Nor is it essential that the liquor should be actually paid for to complete the offense. The object of this trial is to ascertain whether the defendant disposed of the liquor in violation of the law. It would not be a violation of this law for one to give away to another spirituous liquor without any hope or expectation of compensation; but if there is an understanding, express or implied, that the party who gets the liquor will in some manner pay for it, or purchase something else because of it, the act is disposing of the liquor within the meaning of the statute.

If the defendant did dispose of the liquor, it is of no consequence whether the motives of the prosecuting witness are good or bad; or whether the witnesses are actuated by public spiritedness, or by purely selfish motives. If you are in doubt as to whether the witness testifies fairly and truly, the motives may be material on that point, but if there is no doubt about the facts, the motives of the witnesses are wholly immaterial.

Some effort has been made to discredit the witness, Woodcock. If you should doubt the reliability of Mr. Woodcock's memory, or his correctness, it will be necessary to consider whether the defendant's witness, Stone, told the truth. If Stone saw Woodcock get the whisky and the candy and lay down a piece of money, it is proper to consider whether he corroborates the testimony of Mr. Woodcock, and to what extent. If the defendant let Woodcock have the whisky and the candy, at his request, with the expectation that he would lay down money, it is immaterial whether the defendant afterwards took up the money or not.

If the defendant has not disposed of liquor contrary to law, he ought to be acquitted. But it is as fair for one man to pay his share of the taxes as for another to pay; and if it is clearly established that the defendant endeavors to evade the law by selling spirituous liquors without obtaining the license that others are compelled to obtain, there is nothing in the case or its circumstances, tending to extenuate or excuse such a course.

You should not be drawn into the error of supposing that

this case is a mere controversy between the prosecuting witness and the defendant. It is not a material question in this case which of those two is the best man, or which is the worst man. But the important question in this case is whether or not the law, requiring license to be obtained, has been violated.

If the best man in the community intentionally violated this law, he should be held to an account as strictly as another.

The jury returned a verdict against the defendant.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1870.

J. P. KENNARD AND WIFE v. PETER SAX.

COVERTURE—PLEADING.—In an action against the wife alone, coverture at the time of making the contract should be plead in bar. When the objection does not go to the liability, but the fact is merely that the party has married since making the contract, the marriage is pleadable in abatement.

BILL OF REVIEW.—A suit in the nature of a bill of review, to set aside or modify a judgment or decree, is entertained by virtue of the original and not the appellate jurisdiction of the court.

ERROR OF FACT.—Errors of fact are such facts as affect the regularity and validity of the proceedings on the record, and still do not appear on it, and they may be put in issue in proceedings by writ of error or on certiorari.

MARRIED WOMAN—SEPARATE PROPERTY OF.—In order to charge the separate property of a married woman, in a judgment rendered against her upon a contract made during coverture, the record should show that the debt was contracted for the benefit of the separate estate, or for her own benefit on the credit of the separate estate.

AFFIRMATIVE RELIEF—DEFENSE.—It is not always the case that facts which would constitute a perfect defense, will afford grounds for affirmative equitable relief.

ERROR THAT DOES NOT PREJUDICE.—Where a judgment has been erroneously entered, without fraud, but the case shows that the amount is justly due from the party complaining, and that payment is withheld, equity will not interfere.

THE defendant had recovered a judgment for \$79 25 against the plaintiff, Angeline Kennard, in a justice's court,

in an action for work done and material furnished in painting a house, and had sued out an execution, J. P. Kennard, the husband of Angeline, not being made a party to the action. In that action the defendant did not plead her coverture, but appeared and answered to the merits.

This is a suit to restrain this defendant from levying the execution on the property of the said Angeline. The plaintiffs allege that they were husband and wife *at the time of the alleged contract* for work and material, and still are such; "that the said Angeline has property in her own name," and that unless restrained, the defendant will cause the execution to be levied upon it; that neither of the said plaintiffs were indebted to the said Sax in said sum for which judgment was obtained, nor in any sum greater than \$16; and that the said Angeline had tendered \$16 for said work and material, which sum they allege was more than the value thereof. The proceeding upon execution had been stayed by a preliminary injunction.

The answer denies information or knowledge as to the plaintiffs being husband and wife. Avers that the said Angeline appeared by counsel in said justice's court and answered to the merits, failing to plead coverture, and that she was then justly indebted for the work and material in said sum of \$79 25. That at the time of the contract and of doing the work, and at the time of the action, the said Angeline was living apart from her alleged husband. That the work was done at her request, on a house held in her own name and right, and that she, in making the contract, represented herself as a *femme sole* trader. The replication denies that she lived apart from her husband and denies making the alleged representations.

The defendant admitted the marriage of the plaintiffs, and without further evidence, the cause was argued and submitted, as upon final hearing.

W. W. Thayer, for the plaintiffs.

A judgment obtained against a *femme covert* cannot be enforced by execution. (*Watkins v. Abrahams*, 24 N. Y. 72; *Coon v. Brook*, 21 Barb. 546; *Williams v. Carrol*, 2 Hilton 438.)

A general debt made by a married woman is not chargeable against her separate estate. (*Curtis v. Engle*, 2 Sandf. 288.)

The general appellate jurisdiction conferred by the constitution on the circuit court is broader than appears by the express terms of the statute in regard to appeals and writs of review. This court can review the proceedings of a justice of the peace for *errors of fact* as well as of law, and where a writ of review will not lie, the remedy is by suit. (*Adsit v. Wilson*, 7 How. Pr. 64; *Valarino v. Thompson*, 7 N. Y. 576.)

Kelly & Reed, for the defendant.

Coverture must be pleaded in abatement. (Gould's Pl. ch. 5, ss. 85, 88; 2 Duer 679.)

If the wife represents herself as *sole* in making the contract, equity will not relieve. Nor if the amount claimed is justly due.

UPRON, J. The first question I propose to consider is the effect of the failure to set up the coverture in the justice's court.

It is said in Gould on pleading, p. 263, sec. 88: "Where a *femme covert* is sued alone she can plead her coverture *only* in abatement," * * * and "if she omits to plead it as a dilatory plea, she waives it, *so far as regards her own privilege*, and tacitly admits she is liable to be sued alone." But I think the author has in view the subject of coverture at the time of the action merely; and not coverture at the time of making the contract.

It is said, in 1st Chitty's Pl. 449: "Coverture at the *time* when the supposed *contract* was entered into, must be plead in bar," though formerly it might be given in evidence under the general issue; "but where the objection does not go to the *liability of the femme*, but is merely that the husband ought to have been sued jointly with her, as where, since entering into the contract, or committing the tort, she has married, she must, when sued alone, plead her coverture in abatement, and aver that her husband is living."

In this case the work was done on a house, the property of the wife, occupied as a residence of the family, during a temporary absence of the husband.

The pleadings are not conclusive as to whether or not she acted as the agent of her husband in contracting for the work. If she was merely the agent of the husband her coverture could have been plead in bar.

Formerly the husband might "at any time come in and plead the coverture in bar," and it was said, that, "if both of them omit to plead it and judgment is given against her, the judgment may be reversed by a writ of error." (Gould's Pl., ch. 5, sec. 89.) This authority points to proceedings at law as distinguished from equity; and it would seem that the coverture might formerly be set up after judgment, either in the court where the cause was tried, or by writ of error.

But our statute in regard to appeals declares: "A judgment or decree may be reviewed as provided in this chapter, and not otherwise." Appeals from justices' courts are also limited by a similar enactment; and the statute does not authorize the court to hear a case on appeal or to exercise appellate jurisdiction, unless the case is brought into the appellate court by the prescribed mode for taking an appeal, or by writ of review. But I cannot see in this restriction, an invasion of the constitutional powers of the court, as is assumed in argument by the plaintiff, nor do I think the plaintiff has occasion to invoke the appellate jurisdiction of the court in this case. If he is entitled to relief from a judgment, and the relief cannot be obtained by appeal or by writ of review in the modes prescribed by statute; that is a sufficient ground for an original suit. I do not base this conclusion on the idea that the record made by a justice of the peace, cannot be disputed, on the writ of review. It has been held, that on certiorari, facts that do not appear in the record, such as infancy, coverture, or the death of a party, may be alleged as error. An *error of fact* is defined to be "such facts as effect the regularity and validity of the proceedings on the record, and still do not appear on it. (*Adsit v. Wilson*, 7 How. Pr. 68.) And it is held that in

proceedings by writ of error, or on certiorari, such facts may be put in issue, although they are not disclosed by the record. (*Harvey v. Rickett*, 15 John. 87; *Williams v. Albany Mayor's Court*, 12 Wend. 266; *Post v. Block*, 5 Denio, 66.)

Whether that practice is proper, under the writ of review prescribed in the code, it is not necessary to decide; but I see nothing in the code that directly prohibits it, and I think it would be assuming far less, to hold that such questions can be brought before the court on petition for a writ of review, than to hold that the constitution has clothed the circuit court with an appellate jurisdiction that has never been recognized by the legislature. I therefore conclude on this point, that the legislature has provided for the exercise of all the appellate power with which art. 7, sec. 9, of the constitution, has clothed the circuit court.

There can be no doubt of the power of the legislature to prescribe a reasonable limit to the time in which application for relief must be presented; and if the plaintiffs had no other remedy than by means of appellate jurisdiction, it is now too late for them to be relieved.

But the plaintiff, J. P. Kennard, was not a party to the action, and is not within the statutes in relation to appeals or the writ of review; he has not waived any right by failure to appeal.

As to the wife, the judgment in the justice's court cannot be enforced against her personally, and in order to bind her separate estate, the record of that case should show that the debt was contracted either for the benefit of her separate estate, or for her own benefit on the credit of the separate estate. (*Curtis v. Engel*, 2 Sandf. 288.) The code, sec. 30, requires the husband to be joined, unless the action concerns her separate property. And I am no way confident that she waived any rights by failing to allege her coverture, or by failing to appeal. The general doctrine of the disabilities of married women is against the position that she waived either her own or her husband's rights by pleading to the merits in the justice's court, in an action not there shown to be one affecting her separate estate.

If these plaintiffs are entitled to relief, equity must afford

it; and I think they are entitled, if the amount of the judgment was not justly payable by either of them.

It was a material allegation in this complaint in this suit, that the judgment was for a greater amount than was due; this was material, because it is not always the case that facts which would constitute a perfect defense, afford grounds for affirmative equitable relief. The plaintiffs ask affirmative relief, and for that reason it devolves on them to show, not only that the judgment is technically defective in law, but that it is against equity. And I think the burden of proof devolved on them to show that this allegation is true, notwithstanding its negative form, it being alleged in the complaint.

For aught that is shown, the amount of the judgment may be justly due from one of the plaintiffs; and as the work was done on a house belonging to the wife, it may have been an equitable lien on her separate estate. (*Yale v. Dederer*, 18 N. Y. 265; *Story's Eq. Pl.*, sec's. 625 and 1,397 to 1,400. Where, without fraud, a judgment has been erroneously entered, but the case shows that the amount is justly due from the party complaining, and that payment is withheld, equity will not interfere.

Whether it was originally a debt of the husband, or a charge on the separate estate of the wife, in either case it would be contrary to the course of equity practice, to interfere, to afford affirmative relief by setting aside the judgment, unless the plaintiffs show that nothing is due; or first pay, or offer to pay, the amount that is equitably due. I am not confident but that it would be the better practice to dismiss this bill, because the plaintiffs have failed to introduce proof on that subject. But as I cannot see that the judgment in the justice's court can be made available to this defendant, except by enforcing it in this proceeding if he shall be successful; and as it is evident from the course taken in the argument, that the omission of the proof arose from misapprehension, there are some reasons in favor of letting it in; and I think it is to the interest of all parties, that the controversy be terminated in this suit. If a trial of the issue of fact be ordered, the amount of the

demand can be determined as well in this cause as elsewhere. I shall therefore direct that that issue be set down for trial by a jury, and if the defendant thinks his claim is a charge on the wife's separate estate, he can set forth in this answer a description of the property on which he claims the lien.

The issue was tried by a jury, and a verdict returned, finding in favor of this defendant something less than the \$16 that had been tendered to him. The amount being paid into court, a decree was entered setting aside the judgment in the justice's court, and refusing to decree costs in favor of either party.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1870.

JOSEPH KNOTT *v.* JAMES B. STEPHENS.

JOINDER OF REPRESENTATIVE OF DECEASED PARTNER.—Where two persons, who were partners in the business of fishing and selling fish, bargained for a block of land, gave their note to the defendant for the price, and took the defendant's bond for a deed on payment of the note, and paid one year's interest before the note fell due; and one of the partners having died, the other claiming to act as surviving partner, assigned the bond and the land to the plaintiff two years after the note fell due, no administration being had, and it being a disputed question whether the land was purchased for partnership purposes. In a suit by the assignee for specific performance, it was held that the question of fact whether the land was purchased for partnership purposes could not be ultimately settled, so as to bind the heirs of the deceased partner, in a suit where neither the heirs or the representatives of the deceased partner were made parties.

SPECIFIC PERFORMANCE—CERTAINTY.—If the representatives were parties, the question of fact might be determined in this suit, and all risk of that question removed by the decree. Fair dealing does not require the defendant to convey to the assignee of the survivor unless he had reasonable grounds of certainty on that question.

INCREASE IN VALUE.—Where no attempt is made to pay the purchase price, and obtain a deed until a considerable change has occurred in the value, and the defendant has made improvements, this has been held a sufficient ground for refusing relief.

THIS is a suit for the specific performance of a contract

for the sale of a block of land in the town of East Portland.

In March, 1866, Joseph Long and Wm. Foster bargained with the defendant, Stephens, for the land; paid him one hundred dollars and gave their promissory note for five hundred dollars, payable, with interest, two years from its date; and Stephens and his wife executed a bond in the sum of five hundred dollars, conditioned for the conveyance of the land on the payment of the note.

Long and Foster were then partners engaged in fishing and selling fish at Oregon City, and the evidence tends to show that they contemplated carrying on that business at some future time at East Portland, and that they intended to use the land in question in their business. On the twelfth of March, 1867, Long paid one year's interest, sixty-dollars, on the note, and in the fall of 1867 Long died, and it does not appear that any steps have been taken toward administering upon the estate of Long. On the twenty-eighth of June, 1870, said Foster, claiming to act both for himself and as surviving partner, assigned and transferred the land to this plaintiff for value. Joseph Long, or some one in his name, paid the taxes for the years 1866, 1867 and 1868 on the land, amounting to \$8.50. The last payment being made in January, 1869. The note fell due March 10, 1868.

After Long's death, and before the note fell due, the defendant, Stephens, asked Foster what he intended about paying the note and taking the land. Foster replied that he did not know.

The defendant, Stephens, testifies that when the note fell due he called on Foster and asked him to pay the note; that Foster declined, saying that he had not the money. That a few weeks later he asked Foster again about the matter, and Foster said he did not care much about getting the land. That a year or more after that, he, Stephens, went to improving the land by driving piles. That the land was worth, when the bond was executed, about \$600; about \$1,200 when Stephens went to improving it; and is worth now, with the improvements, about \$3,000.

Mr. Foster testified that the note was never presented to him for payment. He did not deny but that payment had been requested, but denied having said that he did not care much about getting the land.

The evidence tends to show that no offer to pay the note was made until after the plaintiff took the assignment, and after the work of driving piles was in progress, and that the plaintiff who tendered payment acquired his interest after the defendant had made a large part of the improvements.

W. W. Thayer, for the plaintiff.

If there is a defect of parties, it has been waived by not demurring or setting it up by answer. (Code, page 156, sec. 70.)

Foster had a complete right to assign the entire interest in the land.

At common law the surviving partner had the legal right to the partnership effects, including real estate; though courts of equity regarded him as a trustee. (1 Paige Ch. 393; 3 *Ib.* 167; 6 Cowen, 441; Story on Part., sec. 344.)

Real estate acquired with partnership funds for partnership purposes, is treated in equity as personal property. (2 Sandf. Ch. 366; 24 N. Y. 505.)

The surviving partner may sell. (2 Sandf. Ch. 366.)

The bond was a chose in action. (1 Abbott Pr. 82; 2 Robt. 26.)

A partner has power to transfer. (25 N. Y. 315.)

Foster was the only party liable in an action on the note; he had a right to make this arrangement to satisfy the note. (5 Denio, 577.)

The heirs of Long could not be joined with Foster as defendants. (17 N. Y. 354.)

They should not be joined as plaintiffs.

Section 1,071 of the code, should not be construed to take away rights which the surviving partner had at common law. (1st Kent's Com. 464; 3 Hill, 272.)

Stout & Burmister, for the defendant.

The penalty is \$500; is not this a case where the plaintiff has a remedy at law? (11 Paige, 352.)

1. Could Foster, as surviving partner, assign? Not having sought to administer or applied to the probate court. (Code, sec. 1,070, p. 417.)

2. This land never having been used in the partnership business, and it being doubtful whether the partners ever intended to so use it, the interest of Long's heirs cannot be disposed of in this suit.

3. Although it is not expressly shown on the face of the bond that time is of the essence of the contract, the circumstances show it. And the evidence not only shows unexplained delay and negligence, but leaves an unavoidable impression that Foster abandoned the contract, or at least waited for speculative purposes, and only came forward by his assignee after the land had risen in value, and had been improved at the cost of the defendant. (Story Eq. Jr. 771, 776; 6 Cal. 571; 14 Pet. 462; 10 Cal. 322; 1 John. Ch. 370.)

4. It is not a case of part performance. The plaintiff's assignor was never in possession.

The case was submitted on the pleadings and evidence for final decree.

UPTON, J. This case presents several difficult and perplexing questions. It is in many respects similar to cases where specific performance has been decreed; and yet it is very difficult, if not impossible, to come to the conclusion that the plaintiff is in a position to demand equitable relief. After a careful examination of the case I am constrained to say that I think there has never been a time since the making of the contract that it was clearly and unquestionably the duty of the defendant to execute a deed of the premises in question.

I shall not now undertake to pass upon the construction or effect of sections 1,069 to 1,074 of the statute relating to the estates of deceased persons. The circumstance that no steps were taken to administer upon the estate of Long, deceased, leaves an uncertainty in regard to the assignment to which it will be necessary to allude; an uncertainty which I think sufficient to render it doubtful whether it was safe

for the defendant to transfer the entire premises to the plaintiff. It is said the defendant knew the law and was bound to take notice of it at his peril. But if we assume (what the courts of this state have not yet decided), that the true construction of the statute is, that a surviving partner may at private sale transfer real estate or an interest in real estate purchased for partnership purposes, without an order of the probate court, and without giving the bond provided in the sections above mentioned; yet there is a question of fact included in the proposition. It is not shown that the defendant had any reason to suppose the land was intended for partnership purposes, or that any assurance or even notice had been given him that such was the case or that Foster had power to act for the heirs or representatives of Long. Nor does it appear now that there is certainty in regard to the land being purchased for partnership purposes, or in regard to Foster's having power to sell.

In this proceeding we must look upon the bond, not merely as an obligation to pay a given sum of money, but as an agreement for the sale of land; otherwise specific performance could not be decreed under any circumstances, but the plaintiff would be driven to his action to recover the money. The evidence shows that the condition of the bond had not been broken by the defendant when the assignment was made. It was not simply a *chose in action* to be transferred as personal property, but the object of the assignment was to transfer an interest in land.

If it should be decided in this case that the land was bargained for or held as partnership property, the heirs of Long, not being parties to this proceeding, would not be barred by the decree in this case from showing hereafter that it was not so held, or from showing that their interest was not subject to be transferred by the surviving partner, under this statute or at common law. The evidence that the land was bargained for or held for partnership purposes, is meager and far from conclusive. It is not shown that that point is or can be rendered certain, except by a judgment or decree.

Unquestionably the plaintiff is not entitled to a decree for specific performance, unless at the time of the demand, it was the duty of the defendant to execute to the plaintiff a deed of the entire premises as demanded; nor do I think that fair dealing would have required the defendant to convey unless he had reasonable grounds of certainty that he was dealing with the real parties in interest; and I do not think that a court ought to enforce specific performance, if that would place upon the defendant an unreasonable risk.

If the representatives of Long were parties in this proceeding, the question of fact might be finally determined in this suit, and that source of uncertainty would thus be removed. But as the case now stands, the sufficiency of the assignment must remain an open question, because the heirs of Long are not parties to this suit.

It appears to me that this is not a mere question of practice as to the non-joinder of parties; but a failure to establish one of the material facts upon which the plaintiff founds his claim to equitable relief. That is, a failure to show with that degree of certainty which equity requires, before decreeing specific performance, that the parcel of land was purchased and held for partnership purposes.

It appears that no attempt was made to pay the purchase price and obtain a deed, until a considerable change had occurred in the value of the property, and the defendant had made improvements of some value. This has been held a sufficient ground for refusing relief. (Story's Eq. Jr., ss. 771, 776.)

I do not feel called upon to decide the disputed question of fact, as to whether or not Foster expressly abandoned the idea of obtaining the land before making the assignment.

Upon the other grounds above stated, I think it would not be proper to decree specific performance, and that the bill should be dismissed.

CIRCUIT COURT FOR THE COUNTY OF BAKER; VACATION AFTER MAY TERM, 1871.

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GEORGE COGGAN AND GEORGE COGGAN, Administrators of the Estate of R. H. Mallory, deceased, PLAINTIFFS,
v. S. B. REEVES, S. ALBERSON AND A. MOORE & BROS., partners, etc., DEFENDANTS.

MECHANICS' LIEN — FORECLOSURE. — Material-men must commence proceedings to foreclose their liens within a year from the date of filing their lien notices.

IDEM. — They must commence by filing a complaint.

IDEM. — The fact of a lien-holder being made a party defendant by a plaintiff, because his lien is subsequent to the one sought to be foreclosed, does not release him from the duty of strictly pursuing his statutory remedy.

THIS case came on to be heard upon a demurrer to the answer of certain of the defendants. The facts are sufficiently alluded to in the opinion.

Wilson, Pierce & Lasswell, for the demurrer.

L. O. Sterns, contra.

McARTHUR, J. This is a suit to foreclose a mortgage executed by defendant, S. B. Reeves, to R. H. Mallory, deceased, and George Coggan; and Anthony, Amasia and Albert Moore, being subsequent lien-holders, were made defendants on motion of the plaintiff. S. Alberson, having some interest in the event of the suit, was also made a defendant. The liens of A. Moore & Brothers are what are known as material-men's liens. They are three in number and were filed in the following order: the first for \$503 $\frac{1}{10}$, on May 17, 1869; the second for \$41 $\frac{6}{10}$, on December 3, 1869, and the third for \$188 $\frac{1}{10}$, on April 30, 1870. They are thus set forth in the answer of A. Moore & Brothers to the original complaint, which answer was filed on May 16, 1870. The plaintiffs and one of the defendants, to wit: Alberson, filed their demurrer to the said complaint on seventeenth of May, 1871, by permission and without objection.

The question raised by the demurrer and presented for judicial determination, is: Have these liens any present vitality? That is, are they valid existing liens, or have they become null and void by the non-compliance of the holders thereof with the law for the foreclosure of such liens?

I am of opinion that these liens have all expired. By the statute, liens of this character cease to exist at the expiration of one year from the time of filing the notice thereof, unless the party filing such lien-notice within that time *commences* an action, or suit, rather, to enforce the same in the circuit court of the proper county.

Section 50, p. 150, of the code of civil procedure, provides that "actions at law shall be commenced by filing a complaint," etc., and the provisions of the section apply and govern the mode of proceeding in suits as well as in actions.

The fact of a lien-holder being made a party defendant by the plaintiff, because his (defendant's) lien is subsequent to the one sought to be foreclosed, does not, in my opinion, release him from the obligation of strictly pursuing his statutory remedy.

In *Noyes v. Benton*, 17 Howard, 449, a case analogous to the one under consideration, it was held that a lien of like character ceased after a year, "because he (the lien-holder) has not done what the statute declares necessary to continue the lien in force after that period. During the year this court could continue the property or keep its proceeds in court, subject to the lien, if proper proceedings were taken to enforce it, and might perhaps obtain jurisdiction so far over the subject matter as to order the lien to be discharged by payments, if it were brought to a close within the year, or if proceedings were still pending for that purpose;" that is, for the purpose of foreclosing the lien by an independent suit.

I cannot look upon the answer of Moore & Brothers as an original complaint for the purpose of foreclosing their liens. Their answer simply advised the court of the fact that they had some interest in the mortgaged premises, which required

the interposition of a court of equity to secure or preserve. Had the original suit been disposed of within a year from the date of their lien-notices, then their interest in the mortgaged premises might have been ascertained and fully adjudicated, but when they saw the time limited to them by statute rapidly passing away without any probability of a final decree being entered in the original foreclosure suit, it was their duty to have *commenced* their suit to foreclose the liens in the manner and form provided by the statute.

The demurrer should therefore be sustained.

CIRCUIT COURT FOR THE COUNTY OF UNION; VACATION AFTER MAY TERM, 1871.

S. ANDERSON, APPELLANT, v. MARY E. LAUGHERY, RESPONDENT.

REGISTER OF STATE LANDS.—The register of state lands for the La Grande District acts within said district simply as the agent or sub-commissioner of the board of school land commissioners.

IDEM.—He cannot render such a decision, judgment or decree as can be appealed from to the circuit courts.

THIS is an appeal from the decision of the register of state lands for the La Grande District. The record, which is very meagre, exhibits the following facts: That on the second day of March, 1871, the register issued two summonses, one to S. Anderson and the other to Mary E. Laughery, commanding said parties to appear before him on the eleventh of March, 1871, to offer testimony in support of their respective rights to purchase from the state of Oregon the N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ S. 21, T. 1. S. R. 39 E. The tract of land described is situate in Union County, Oregon, and contains eighty acres. The said summonses were duly served upon each of said parties. Subpoenas were also served upon several persons, to compel their attendance as witnesses. The certified copy of the register's journal entry, accompanying the record, shows that the said register or-

dered and adjudged, after hearing the proofs and argument of counsel, that the said Mary E. Laughery was equitably entitled to the right to purchase and possess said tract of land. From this decision, Anderson appeals to this court, and this appeal Laughery insists should be dismissed, and therefore files motion to dismiss the same.

Ellsworth and Wilson, for the motion.

Baker and Lichtenhaler, contra.

MCARTHUR, J. Section 13 of the act to create the office of register of state lands for the La Grande District, and to provide for the disposition and sale of state lands, approved October, 26, 1868, provides, among other things, that "appeals in all contested cases shall be allowed from the decision of the register to the district court of the county in which the land is situate, in the same manner as appeals from the courts of justices of the peace." The phraseology of the entire section, and particularly of the part quoted, is very peculiar and singularly inapt, as will plainly appear by reference to Article VII, section 1, of the state constitution. That section enumerates all the courts known to the judicial department of the state and makes no allusion to any such tribunal as the "district court." It is urged that the legislature intended that appeals should lie to the circuit courts. However correct this assumption may be in point of fact, I do not feel myself at liberty so to decide. If there was any, the slightest, ambiguity in the language used, I might, all things considered, be strongly inclined to so hold; but there is no ambiguity whatever about the expression; it is very clear, though as before remarked, very peculiar. It is an unfortunate misnomer of the tribunal intended, *resulting probably from the too hasty preparation and passage of the act*, and one which I think cannot be corrected by judicial construction. Taking it for granted, however, that the intention of the legislature was that appeals should lie to the circuit courts, another part of the section first above cited erects an insurmountable barrier in the path of legal administration of justice under this legislative enact-

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ment, for it is provided that "the issue of the trial in the district court shall be the same as before the register." This provision limits the action and the power of the appellate courts and binds them to affirm the decision of the register, for it emphatically declares that "the issue of the trial," that is to say, the close, the end, the result, the termination of the cause in the appellate court "*shall be the same as before the register.*"

But assuming that section 13 of the act of the legislature alluded to, fully and clearly provided that appeals should lie to the circuit courts, and that when appealed, all cases should be tried upon substantially the same issues presented before the register, there are other and more cogent reasons which appear to me to fully warrant the court in sustaining this motion. Section 525 of the code of civil procedure provides that "a judgment or decree may be reviewed as prescribed in this title, and not otherwise. An order affecting a substantial right, and which in effect determines the action, suit or proceeding, so as to prevent a judgment or decree therein, or a final order affecting a substantial right and made in a proceeding after judgment or decree for the purpose of being reviewed, shall be deemed a judgment or decree." The question, therefore, presents itself: Does the decision of the register in effect determine the action or suit (if the proceeding before him can be so styled) so as to prevent a judgment or decree? Clearly not, and for the following reasons: By examination of sections 5, 6, 7, 11, 12 and 17, of the act to create the office of register of state lands for the La Grande District, etc., it conclusively appears that the said register is nothing more nor less than the agent or sub-commissioner of the board of school land commissioners created by act of the legislature, approved October 22, 1864. By the sections referred to, it is enacted that all applications for the purchase of lands in the La Grande District are to be made in duplicate and are to be filed, the one with the register, the other with the board of commissioners. The said board acting for the state, and not the register, makes and executes the deeds to the applicants, the register simply delivering them. It is

also made the duty of the register to make out, on the last of every month, full reports of all his official actions, and forward the same to the board of commissioners, and when there are adverse claimants, although it is incumbent upon the register to take the testimony of witnesses "and hear and determine from the testimony presented, the rights of the respective parties," yet it is especially enacted that "all contested claims shall be transmitted to the board of commissioners in a special communication with a brief statement of the decision rendered by the register and his reason therefor." From this provision of the law I am satisfied that before the decision (so called) of the register can be carried into effect, it must meet with the sanction and approval of the board of commissioners, and such being the fact, I cannot see how a conclusion upon the testimony arrived at by him can be what is known to the law as a *decision*, much less a final judgment or decree from which an appeal would lie. In this same connection it must be borne in mind that the board of commissioners is empowered to make rules and regulations for the government of the register's office, and all his acts must conform to such rules.

In view of these provisions of the law I am of opinion that the register cannot render such a decision, judgment or decree as would answer the requirements of section 525 of the code. I can reach no other conclusion than that he acts simply as the agent of sub-commissioner of the board of school commissioners, and his acts being controlled by the rules and regulations of the said board, and his decisions (so called) being returned to the said board for its official approval or disapproval, are not such as can be appealed from to this court. They in no wise determine the action, suit or proceeding so as to prevent a judgment, decree or order therein, for, before a *final* order affecting a substantial right of either of the claimants can be made, the power of the board of commissioners must be invoked. It has been clearly pointed out that the register is required to submit all contested cases to the board, and by reference to section 11 of the act of the legislature, approved October 22, 1864

(General Laws, p. 886), it will be found that it is further provided "that the commissioners may make rules for the transaction of business under this act, and shall decide all questions about priority of settlement and other disputes between applicants, and all their acts and decisions shall be final," etc. The board, then, being a tribunal whose decisions are final in cases arising under the land law, exercises greater power than can be exercised by the circuit courts, for their decisions are not final. For the convenience of argument let us assume that section 13 of the act approved October 26, 1868, is in all respects perfect, and properly provides that appeals shall lie from the register to the circuit courts, what weight can possibly attach to the decisions of those tribunals? Can they bind the board of commissioners? I think not. For example, suppose A. and B. are contesting before the register the right to purchase a certain parcel of state land, and that the decision of the register is adverse to B.; B. appeals to the circuit court and the decision of the register is reversed, it being adjudged that B., and not A., has the right to make the purchase. In the meantime the register, in accordance with the law, forwards his findings and reasons therefor to the board of commissioners, who approve the decision and make a final order in the case affirming the right of A. to purchase, and on that order a deed is executed to A. Which of these decisions prevails? Most certainly that of the board. It is not required to defer to the decision of the circuit court, nor indeed is it obliged to conform its acts and decisions to any other rules or regulations than those of its own adoption. The judgment of the circuit court, therefore, carries with it no force whatever, and although it may hear and determine a case on appeal, it is absolutely powerless to enforce any judgment it may render. It most certainly could not set aside the deed and enforce the rights of B. in a proceeding of this nature. Further, there does not appear to be any issue of fact or of law presented by the record to be tried in this court. There are no verified pleadings to guide the court in passing upon whatever questions may be presented; even the applications of the re-

spective parties do not accompany the record, and it would be a very anomalous proceeding in a court of record, to proceed with the trial and investigation of a cause without something in the nature of a pleading to limit the extent of its inquiries and guide it in entering a judgment or decree.

From the foregoing, it follows that the motion to dismiss should prevail. It is, therefore, so ordered.

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CIRCUIT COURT FOR THE COUNTY OF WASCO; VACATION AFTER
JUNE TERM, 1871.

JAMES M. BIRD, PETITIONER, v. THE COUNTY OF WASCO,
RESPONDENT.

FEES OF OFFICERS.—The act of the legislature approved October 21, 1864, in relation to the fees and compensation of officers, etc., in the counties lying east of the Cascade range of mountains, is an original, independent act, and not merely an amendment to a pre-existing law.

ENACTMENT AND REPEAL.—When the legislature seeks to repeal an act or to limit its territorial application, it is not necessary to set forth the entire act or section, as in cases of revision or amendment.

LEGISLATIVE POWER.—Except in special cases, where the constitution prohibits it, the legislature may control the unearned emoluments of office.

THE petitioner, the sheriff of Wasco County, deeming himself entitled to additional compensation for certain services, and his claim therefor being denied by the county court of Wasco County, obtained a writ of review to correct the judgment of the said court. The writ was issued and duly returned with the record in the case. In this court the respondent demurred specially, and all the questions of law involved were raised by said demurrer.

N. H. Gates, for petitioner.

W. B. Lasswell, District Attorney, and *J. G. Wilson*, for respondent.

McARTHUR, J. The first question presented in this case is, does section 1 of the act approved October 21, 1864,

operate to increase the fees and compensation prescribed by the act approved October 24, 1864, or was its operation limited to the act approved January 19, 1855, which was in force at the time of its passage and approval? On investigation it will be found that section 31, of chapter 18, page 741, of the general laws of Oregon, is the first section of the act approved October 21, 1864. It provides that the fees and compensation of certain officers, including sheriff, of the counties east of the Cascade range of mountains, be increased thirty-three and one third per centum in addition to the fees allowed by law. The act regulating the fees and compensation of officers then in force, was approved January 19, 1855. That act was directly repealed by the general repealing act of October 17, 1862, which took effect by special provision from and after May 1, 1865. On October 24, 1864, an act to prescribe the fees of certain officers and persons was approved, and by constitutional operation took effect on January 22, 1865. The act of January 19, 1855, and that of October 24, 1864, being repugnant, the former gave place to the latter, and hence the act of January 19, 1855 was doubly repealed. Keeping in view these facts, let us recur to the question. The solution thereof will depend entirely upon the character of the act of October 21, 1864. If it be construed to be an amendment to the act of January 19, 1855, then its provisions must be considered as confined to that act alone, and the conclusion, that its operation ceased with the repeal of the act to which it was an amendment, seems irresistible. Such construction, however, I do not think can reasonably be placed upon it. There is nothing in the title, the preamble, or the body of the act, which, in my opinion, warrants the conclusion that it was intended merely as an amendment to the act of January 19, 1855. I am of opinion that it is an original, independent act, and this opinion, I think, is fully warranted by the fact that its provisions are made applicable to all counties organized, *or to be organized*, in that portion of the state lying east of the Cascade range of mountains; and the further fact, that the general repealing act, which provided for the repeal of the act of January 19,

1855, had been passed nearly two years previous. It is true that it had not taken effect, and was not to take effect until May 1, 1865, but it seems to me that in the passage of the act of October 21, 1864, the legislature, under the circumstances, could not have intended it as an amendment to an act the repeal of which had recently been provided for. If viewed as an amendment *merely*, it does not conform to section 22, article 4 of the state constitution, and it must therefore fall. The only construction that can be put upon it, to give it force and effect, is to consider it an original, independent act. It is a very well settled rule in the construction of statutes, that when an act of the legislature is ambiguous upon its face, and susceptible of different constructions, such construction as would declare it unconstitutional should be avoided, when it can be fairly done. (*French v. Teschemaker et al.* 24 Cal. 518.) It can be fairly done in this case.

It being determined that the act of October 21, 1864, is an independent act, and not a mere amendment, is it repealed by implication, by the act of October 24, 1864? It is a maxim of law that subsequent laws repeal prior conflicting ones, and keeping this in view, let us examine the two acts. The one provides that the fees and compensation of officers, in certain counties organized or to be organized in that portion of the state lying east of the Cascade range of mountains, shall be increased thirty-three and one third per centum. It is from its nature a special law, though not such an one as is prohibited by section 23 of Article IV of the state constitution. The other is a general law regulating the fees and compensation of officers, etc. They are in *pari materia*, and are to be taken as if they were one law. (*Smith's Com.* 751, sec. 736; *Rexford v. Knight*, 15 Barbour 627.) There is no repugnancy between them. Nothing in either which negatives the provisions of the other. They are both affirmative, and the substance such that both may stand together. Such being the case, the rule is that the latter does not repeal the former, but they shall both have a concurrent efficiency. (1 Blackstone's Com. 90.) The next question is: What effect has the act of the legislature

approved October 20, 1870 (session laws 1870, p. 12), upon section 31 of chapter 18 of the general laws, heretofore cited? This act provides, that the said section, "so far as the same applies to the counties of Wasco and Umatilla, be and the same is hereby repealed." It is contended by counsel for petitioner that this act is unconstitutional, for that it conflicts with section 22 of Article IV of the state constitution, which declares, "that no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length." If the act attempted to amend or revise the law as it stood before same was approved, the objection would be well founded, and under the rule laid down in the *City of Portland v. Stock*, (2 Or. 69), it would be fatally defective. The rule in that case, however, does not apply. It is not a revision or an amendment, but a repeal of so much of section 31 as applies to Umatilla and Wasco counties. When the legislature seeks to repeal an existing act or to limit its territorial application, it is not necessary to set forth the entire act with the repealing clause, or with the limitations and restrictions affixed thereto. The repeal of a statute can be legally effected by an act properly referring to the one sought to be repealed, and restrictions and limitations can be placed upon an existing law by an act of the legislature properly designating the one sought to be restricted and limited, and at the same time clearly setting forth the restrictions and limitations. Hence the act referred to does not contravene the constitutional provision, and is therefore valid. It repeals section 31 of chapter 18 of the general laws, so far as it applies to Umatilla and Wasco counties, and limits and restricts the application thereof to the other counties lying east of the Cascade range of mountains. The question, whether the legislature could, under any circumstances, legally pass an act decreasing or diminishing the fees and compensation of an officer during his term of office, was mooted in this case. It was urged that when the petitioner took the office of sheriff, he entered into a contract with the county of Wasco to serve in that capacity for the term of his office for the fees and compensation as

then provided by law, and it was contended that an act passed diminishing the same contravenes public policy and impairs the obligation of the contract. An extended discussion of this question is unnecessary. That the legislature had the power to pass the act of October 20, 1870, I have no doubt, for the authorities abundantly establish the principle, that except in the special cases where the constitution prohibits, the legislature may control the unearned emoluments of office. (*Connor v. The Mayor, etc., of New York*. 1 Selden 285 and authorities therein cited.)

It follows, therefore, that the demurrer should be sustained, with costs against the petitioner.

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CIRCUIT COURT FOR MULTNOMAH COUNTY, JANUARY TERM, 1871.

S. E. FLEMING AND P. NEVIL, PETITIONERS, v. CINCINATUS BILLS, SHERIFF.

HABEAS CORPUS.—On *habeas corpus* to discharge from an order holding to bail, a rehearing of the evidence is not a matter of course.

PROCESS.—Informality in the commitment will not justify a discharge when it is in the power of the petitioner to produce the record, and he fails to produce it.

CERTIORARI AS AUXILIARY TO HABEAS CORPUS.—A writ of review as auxiliary to the writ of *habeas corpus* being granted, the court refused to rehear the witnesses who were examined before the committing magistrate.

LOTTERY.—A lottery is a game of hazard in which small sums are ventured for the chance of obtaining greater. Payment of prizes in money is not essential.

PROCESS.—An order of commitment made by a court having jurisdiction, is not void because of error of fact or of law.

A WRIT of *habeas corpus* having been served on C. Bills, sheriff of Multnomah County, he returned the writ, stating that the petitioners were held by virtue of a commitment issued by D. C. Lewis, Police Judge and *ex-officio* Justice of the Peace. The return sets out a copy of the commitment, which purports to follow section 403 of the criminal code; but in designating the crime it uses the words "carrying on

a lottery." The statute, in defining the offense, uses the words: "If any person shall promote or set up any lottery for money or other valuable thing—"

The petition stated that the imprisonment was illegal, in that—

1st. The complaint does not contain facts sufficient to constitute the offense charged.

2d. The facts stated in the complaint do not constitute an offense.

3d. There was no evidence produced before the aforesaid justice to establish the offense charged.

Lansing Stout and *Theodore Byrmister*, for the petitioners, said:

We are willing to waive the informality of the commitment if the case can be heard on what we deem its merits. The evidence before the magistrate proved a raffle, but had no tendency to prove the existence of a lottery.

We move for subpoenas, and for the privilege of submitting the same evidence that was submitted to the justice.

A. G. Gibbs, District Attorney, objected.

The motion was denied.

It was *held*, that a rehearing is not a matter of course on *habeas corpus* to discharge from an order holding to bail, and that a discharge cannot be granted on a *habeas corpus*, on a claim that the decision is against the *weight* of evidence. That if the circuit court or judge should undertake to re-examine the witnesses on such ground, it would not be exercising an appellate or supervisory jurisdiction, but simply performing the labor of the committing magistrate a second time—since the proof may be very different to-day from what it was on the examination.

The petitioner's counsel moved for a discharge for defects in the commitment: *Held*, That informality in the commitment will not justify a discharge where it is in the power of the petitioner to produce the record and he fails to produce it. (*Hurd on Habeas Corpus*, 355 *et seq.*)

The petitioners then produced a certified copy of the

justices' docket, as a foundation for leave to introduce evidence.

The district attorney objected that if the purpose was a review, the proceedings should be regularly brought up, that the judge might have jurisdiction to remand the case to the justice if error should be found.

The objection was sustained. (*Id.* 358.)

The petitioners then asked and obtained time to apply for a writ of review, as auxiliary to the writ of *habeas corpus*.

Upon return of the writ of review, the docket entries disclosed an order reciting a complaint, and reciting that an examination was had, witnesses of both parties being examined and a statement waived, and that an order of commitment was entered in regular form.

The petitioners' counsel renewed the motion for leave to examine the witnesses *de novo*, claiming that since the repeal of the law requiring the evidence to be written there was no other mode of review.

The district attorney claimed that the repeal was for the purpose of preventing any re-examination of the evidence. *Held*, That the proposition to re-examine the witnesses is subject to the objection that it would not be a review of what had been done by the justice; that there is no issue as to what can be proved at the present; and that the material point relates to what was done on the examination.

The parties consented to proceed according to the rule adopted, in cases of alleged *error of fact*, by the circuit court of the District of Columbia. The rule is found in Hurd on Habeas Corpus, page 354. Under that rule the committing magistrate made a statement of what occurred on the examination. (The oath was waived.)

It appeared from the statement of the police judge that the proofs before him were to the effect that the petitioners were conducting a scheme or game operated by means of dice and a box containing prizes. The box was divided into compartments; these compartments were numbered from eight to forty-eight inclusive. Some of these compartments contained prizes; others were empty or blank. The game

was played by means of eight dice thrown by the person who chose to pay the specified sum for the chance of winning a prize. If such person threw a number corresponding with the number of a compartment containing a prize, he became entitled to a prize contained in that compartment, otherwise he received nothing.

Reference was also made by the police judge to some evidence of experts touching the meaning of the word "lottery."

The case was argued at length; Mr. Burmister claiming that the game in question is a raffle and not a lottery, and the district attorney arguing that it is a lottery.

URTON, J. filed the following opinion:

The constitution of the state prohibited lotteries and the sale of lottery tickets, and the statute makes a violation of this clause of the constitution punishable as a felony; other games of chance forbidden by statute are declared misdemeanors. The importance to the petitioners of this distinction is obvious.

The recent inauguration of lotteries in a neighboring state, on a scale of such magnitude, and under such specious appearance of morality and even benefaction, as to include this state within the circle of its influence and make it part of the theatre of its practical operations, adds to the present interest and importance of every question of penal law on the subject.

These considerations have led me to make a careful examination of all the authorities presented by counsel, and of such others as are accessible, touching what is treated as the principal question in the case; that is, whether the game in question is one that is forbidden by the constitution and made punishable by imprisonment in the penitentiary.

The following definitions of the word "lottery" have been laid down by the law writers:

"A game of hazard in which small sums are ventured for the chance of obtaining greater." (*Bell v. State*, 5 Sneed, 507.)

"A scheme for the distribution of prizes by chance." Bouv. Law Dic. (Webster also uses the same words.)

"A game wherein a person paying money becomes entitled to money, or some other thing of value, on contingencies, to be determined by lot cast by the managers of the game." 2 Bishop Cr. L. s. 946. Mr. Bishop says: "This definition has not been laid down in words by the tribunals."

"Payment of prizes in money is not essential to a lottery." (3 Seld. 237.) "The art union scheme is a lottery." (*Id.* 239.)

Bouvier, in his dictionary, under the title "Gaming," says: "There are some games which depend altogether upon skill, others upon chance, and some others are of a mixed nature. Billiards is an example of the first, lottery of the second, and backgammon of the last."

The petitioners claim that the game or scheme here presented differs from, and lacks the essentials of a lottery in these particulars: First, in this game the person paying the money casts the lot; Second, a scheme or game is not a lottery, unless all the ticket holders, or all the persons paying money, taken collectively, have a certainty that some one or more of their number will gain the prize or prizes hazarded. They rely particularly on the definition given by Bishop.

I have examined most of the authorities cited by Bishop, and I do not find it laid down that the lot must be *actually* cast or drawn *by the managers of the game*, or that a personal participation by the party paying, such as drawing a number with his own hand, would so change the character of the scheme that it would not be a lottery.

These citations are (3 Seld. 228 and 240; 13 Barb. 577; 2 Denio, 88; 2 Mill, 128; 3 Zab. 465; 5 Rand. 652 and 715.)

- There is some reason drawn from the definitions cited to think that, if throwing the dice is an exhibition of skill on the part of the person who pays for the chance, the circumstance is material—for it seems essential to constitute a
- lottery that the scheme should not be a game of skill. But is the throwing of the dice in an honest manner an exhibi

tion of skill? I think that mode is selected on the theory that the result of a fair throw of the dice is wholly a matter of chance. Nor do I find any adjudication to the effect that a scheme is not a lottery, unless each holder of a chance, or all of them collectively, has a certainty that a prize or prizes will be gained by some one of their number.

If, as is claimed that the word "distribution," used by Bouvier and Webster, tends to such an inference, it is certainly not a necessary deduction from the language of their definition.

"A scheme for the distribution of prizes by chance" may provide for distributing them all at one time or at several times, absolutely to one set of persons or conditionally to that set or class. It may allow one person to exhaust all his chances, before other persons accept a chance, and still the scheme is within that definition.

Since no adjudication has been found directly in opposition to the decision of the police judge, that decision should not be reversed, unless some sound reason is found elsewhere for holding that he is in error.

The American Cyclopædia thus defines lottery: "A gaming contract, by which, for a valuable consideration, one may by favor of the lot obtain a prize of a value superior to the amount or value of that which he risks." The writer says: "In its best and most frequent application, the word describes those schemes of this nature which are conducted under the supervision and guarantees of government."

The same work continues: "Two kinds of lottery may be distinguished. The Genoese or Numerical, and the Dutch or Class lottery." This work describes the former as a scheme by which, out of ninety consecutive numbers, five are to be selected or drawn by lot. "The players fixed upon certain numbers, wagering that one, two or more of them would be drawn among the five, or that they would appear in a certain order."

Of the Dutch or Class lottery the author says: "In this species the number and value of the prizes are regularly estimated, all the ticket holders are interested at once in the play, and chance determines whether a prize or a blank shall fall to a given number."

The position taken by the petitioner's counsel is, substantially, that no scheme is a lottery unless it comes within the last definition.

What is called the Genoese lottery certainly does not come nearer to what is claimed by the defendant's counsel as indispensable, than does the scheme presented in this case. In the Genoese lottery it is not essential that there should be tickets or ticket-holders, or that a given number of chances should be taken, nor that the holders of chances should have a certainty that a prize, or anything of value, would be gained by one or more of their number, or that there should be more than one person at the time betting, or venturing money against the managers of the game.

From my examination of the case I am not prepared to say that the committing magistrate erred in holding the game in question to be a lottery. I cannot, therefore, upon the writ of review, reverse his decision. The record discloses sufficient to cure the alleged defeat of form in the commitment. (Hurd on Habeas Corpus, 353.)

When the charge was duly presented, and the defendants were brought before the magistrate, the magistrate had jurisdiction to proceed with the examination, and to decide every question of fact or law that was presented, including making the order of commitment. Such an order, made by a court having jurisdiction, is not void, even though it may be voidable, because of error of fact, or of law, but the imprisonment is legal until the order is set aside, consequently the petitioner is not entitled to be discharged solely for informality in the commitment.

If I was satisfied that the order was erroneously made, it would be my duty to reverse it. But I am not satisfied that such is the case, and must deny the petition.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JANUARY TERM, 1871.

IN THE MATTER OF THE PETITION OF T. J. CARTER, TO TAKE TESTIMONY *de bene esse*.

TESTIMONY DE BENE ESSE—NOTICE.—The petition in a proceeding to perpetuate testimony, is addressed to the discretion of the court or judge; and under peculiar circumstances notice to the adverse party was required.

ITEM.—This proceeding should not be resorted to merely to ascertain what an adverse witness will testify.

THIS being a proceeding to perpetuate testimony, the petition presented the following statement:

That the testimony of Green C. Davidson, and of a person called Joseph Thomas, who reside at Fairfield, in Marion County, Oregon, is and will be material to the defense of your petitioner in said action. That the question involved in said action is, and will be, whether or not said Joseph Thomas, so called, is the heir-at-law of one Finice Thomas, called Finice Caruthers, late of Multnomah County, deceased.

1st. That the facts expected to be proved by Green C. Davidson are, that the man called Joseph Thomas is not an heir-at-law of Finice Thomas, commonly called Finice Caruthers. That he is not the father of said Finice, and that Joseph Thomas is an assumed name, and not his real name; together with other facts and circumstances tending to prove the main facts expected to be established. .

2d. That the fact expected to be proved by said Joseph Thomas, so called, is that he is not an heir-at-law of Finice Thomas, commonly called Finice Caruthers; also, that he was never married to Elizabeth Caruthers, and that he is not the father of Finice Thomas aforesaid, nor the person he is represented to be; also, to prove by him the place of his birth, and who were his father and mother, and the place of his residence, and his acquaintances, or some of them, at each of said places, together with other facts and circumstances, tending to show the main facts, expected to be established as above stated.

That the persons claiming the said lands adversely to your petitioner, and who will be adverse parties in said action, are George Pease, W. C. Johnson and F. O. McCown, who reside in Clackamas County, Oregon.

That said Davidson is between fifty and sixty years of age, and resides out of the jurisdiction of this court; and Joseph Thomas, so called, is over sixty years of age, and resides out of the jurisdiction of this court, and is very infirm, and is likely to die at any time.

Wherefore your petitioner prays for an order allowing the examination of said witnesses at as early a day as your honor may deem proper, to the end that the testimony of said witnesses may be perpetuated, and, as in duty bound, your petitioner will ever pray.

W. C. Johnson, Geo. A. Pease and F. O. McCown opposed the petition, and filed an affidavit to the effect that the said two lots are a part of the estate of Finice Thomas, deceased, commonly known as Finice Caruthers, and is of the value of about \$200. That D. B. Hannah, Charles M. Carter, and others who are named, claim the whole of said estate, basing their claim on the allegation that Joseph Thomas, the father of said Finice, died before the death of his said son, and that the parties last aforesaid have been and still are in possession of the lands belonging to the said estate. That said Johnson, Pease and McCown claim to be owners of the whole of said estate, under the allegation that Joseph Thomas survived his said son, and has conveyed the said lands of said estate to them.

The affidavit proceeds with a statement of facts tending to show that said two lots were conveyed to said T. J. Carter, to enable him to make this application, and that the real object of the petitioner is not to perpetuate testimony, but to ascertain what the witnesses will testify, in order to prepare for the trial of a cause now pending in this court, in relation to the title to all the lands constituting said estate, in which cause said D. B. Hannah, Charles M. Carter, and others aforesaid are plaintiffs, and said Johnson, Pease and McCown are defendants; and to compel the grantor of said Johnson, Pease and McCown to disclose their defense in

the said suit, and to disclose the facts within his knowledge, against his will and in advance of taking his testimony in the suit last mentioned.

The petitioner also filed affidavits showing that the failure of proceedings upon two orders previously made in favor of this petitioner on the same subject; was not occasioned by his fault or neglect, and stating that the petitioner owns no part of, or interest in the tract of land mentioned in the counter affidavit, except the two lots mentioned in the petition; and that the other persons mentioned in said affidavit were not owners of any interest in said two lots. That the adverse parties had control of the witness, Thomas, and would not allow petitioner to see him. A deed was also produced conveying the two lots to the petitioner for a consideration of \$200.

A. C. Gibbs, for the petitioner, urged that a petitioner who complies with the statute is entitled to the order as a matter of right. That the discretion mentioned in the statute relates to designating the person who shall act, and to the time and place, and the notice. That if the adverse parties are correct in holding that granting the order is discretionary, the truth will not harm them, and if the said Thomas is an imposter, it is the greatest injustice that the petitioners should be debarred from seeing him, or from compelling him to communicate the truth as to the place of his birth, his alleged marriage, and his history generally. That if the judge is to exercise a discretion, it is within the knowledge of the court that the adverse party claim that said Thomas is the father of Finice Caruthers, *alias* Finice Thomas, and the petitioner is entitled to know the nature of his testimony, in order to know how to meet the evidence that may be adduced against the petitioner. That the anticipated controversy is not sham, but is real.

J. H. Mitchell and S. Huelat, contra.

The material statements of the affidavits of W. C. Johnson are not denied. It is evident that this proceeding is for the purpose of compelling a disclosure of evidence prefatory to another case. The order rests in the discre-

tion of the judge, and it should not be granted unless the judge is satisfied that the real purpose of the petitioner is to perpetuate testimony.

UPTON, J. filed the following opinion, denying the order.

Where a statute provides that a court under given circumstances *may* make a specified order, it sometimes imports an absolute duty to make the order. In such cases it is said "may" is construed to mean "shall." Where the intention is not only that the court may make the order, but also that the suitor may of right demand it, the right of the suitor implies a duty of the court. Where a matter becomes a right of a suitor it is no longer within the discretion of the court.

Upon the previous applications, I was under the impression that the statute for taking evidence *de bene esse* was of that character; my attention not being called to the peculiar wording of the last clause of section 849.

It is there unequivocally shown that the court or judge is called upon to exercise a discretion; although the words of the first clause of the same section, if that clause stood alone, would import that a petitioner filing the prescribed verified petition could claim the order as a right. It was my impression at the time of making the previous orders, that the discretion of the judge was limited to the question whether the facts enumerated in the statute, appeared from an inspection of a duly verified petition.

But the statute provides that, where these facts do appear, "the judge may thereupon *in his discretion* make an order allowing the examination, prescribing the place thereof, and how long before the examination the order and notice of the time and place thereof shall be served."

This language does not import a discretion as to the time, place and notice only. But the judge may, in his discretion, make or deny the order. This is not an arbitrary power to grant or refuse, as may be most pleasing to the judge, but it is a judicial discretion to be exercised according to the principles of equity for the benefit and protection of parties interested.

I am not called upon to decide whether, upon a first application, an adverse party would be entitled to file affidavits in opposition to the petition, or whether a notice to the adverse party on a first application could properly be ordered. I deemed the making of a third application a sufficient reason for requiring the notice and permitting counter affidavits. Although the petitioner has exonerated himself from any charge of negligence in regard to the former proceedings, I think I am called upon by the present condition of the case to look into the counter affidavits.

Some of the positions assumed, and some of the statements made by the petitioners' counsel in the argument, obviate the necessity of passing upon questions of fact in regard to the objects for which the petition is presented.

He charges that the witness Thomas, upon whose personal identity, as the alleged father of Finice Caruthers, depends the title of a vast estate of which these two lots were a part, has conveyed his interest to, and is under the personal influence and control of the parties adverse to the petition, and that they persistently deprive the petitioner of access to the witness. That it would be hazardous for parties to the equity suit to take said Thomas' deposition and thus make him their witness in the important matter, without first knowing the nature of his testimony. And he argues from these facts that justice requires that this order should be made to enable the petitioner to discover, or rather to compel a discovery of, the facts within the knowledge of the witness Thomas.

I think it sufficiently appears from these admissions and the papers on file, that the leading object of this proceeding is to ascertain what the witness Thomas will testify, with a view to prepare to meet and controvert his statements, rather than for the purpose of *perpetuating* the evidence he may depose.

The object of the statute is to enable a party to *perpetuate* testimony, and it would be an abuse of the discretion vested in me if I should knowingly pervert the object of the statute, and make it subserve a purpose the legislature never intended.

If I am correct in these conclusions of fact, the effect of granting the prayer of the petition would be to make the order operate as a *habeas corpus* to bring a person before a tribunal without such a showing as would authorize that writ, and to compel the party to appear, under an assumption that the object is to perpetuate testimony, when the real object is quite different. Such a proceeding is not contemplated by this statute, and it would be a violation of those personal rights that should be protected by the law.

If I thought this proceeding was had for the purpose of perpetuating testimony essential to the protection of the petitioner in regard to the two lots, and that that was the leading motive in making the application, I would feel bound to grant the order without regard to the effect it might have upon other parties or in another case. But under the circumstances disclosed, I am satisfied the order should be denied.

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1871.

H. C. DRAY v. C. CRICH.

SPECIAL VERDICT.—A special verdict is that by which the jury find the facts only.

IDEM—EFFECT OF.—Where the verdict was such as to show that the jury did not intend to find a general verdict, and the court in rendering judgment treated it as a general verdict, the judgment was set aside.

JUDGMENT—CERTAINTY.—When a judgment is rendered, the record should show unequivocally what matters have been adjudicated.

THE facts are stated in the opinion filed in the cause.

O. P. Mason, for the petitioner.

Caples & Moreland, for the respondent.

UPTON, J. A writ of review was issued on petition of the plaintiff directed to the defendant, who is a justice of the

peace, for the purpose of reviewing proceedings had before him in an action entitled *Irwin Burke v. H. C. Dray*.

In that action the plaintiff, Burke, sued to recover possession of a tract of land. The answer, among other things, set up in substance that the defendant had leased the premises from the plaintiff for one year, to be farmed or worked by him for a share of the crops. That after the expiration of the year, he had continued in possession with the consent of the plaintiff, Burke, for some months, during which time he had sown crops thereon, with like consent, which crops were then growing; the defendant claiming that the lease was still in force, and that he was still tenant of the premises from year to year, and had a right to remain in possession.

The cause was tried before a jury, who rendered the following verdict:

"We, the jurors, give verdict for plaintiff, claiming the defendant's right to have free access to the premises now in dispute, to harvest or gather any crops or produce of the soil planted or sown by said defendant before service of notice to quit the said premises now in dispute; that said defendant shall quietly deliver up to said plaintiff the possession of said premises without delay."

Thereupon the court rendered a judgment for the restitution of the premises to the plaintiff, and for costs.

Several errors are assigned, but the only assignment necessary to be now considered, presents the question whether the court erred in receiving the verdict and rendering judgment upon it.

It is claimed in favor of this proceeding:

1st. That this is substantially a special verdict which was within the province of the jury to render.

2d. That if an error was committed, no substantial right of the defendant has been disregarded or prejudiced.

3d. That there is sufficient in the verdict to warrant a judgment of restitution, and that all other parts may be rejected as surplusage.

If the jury had presented conclusions of fact, such as a court could act upon in determining the law of the case,

their verdict might be treated as a special verdict. But here there is nothing of that kind except that part which might be construed as a general verdict. All else is conclusion of law, or of law and fact. "A special verdict is that by which the jury find the facts only, leaving the judgment to the court." There is no part of the special finding that is of this character.

There is, probably, that in the finding which, if standing alone, the court might treat as a general verdict. But it is obvious that the jury did not intend to render a general verdict for the plaintiff, without restriction or limitation. On the contrary, if this finding be compared with the pleadings, it will be seen that the jury considered the defendant rightfully in possession when the crop was sown; that is, after the termination of the first year of the tenancy.

If error exists, it is one that affects a substantial right; the judgment is the same that would have been rendered on a general verdict for the plaintiff, and it is impossible to construe the language employed by the jury as expressing an intention to find for the plaintiff generally; we cannot deduce from the case that the jurors would have agreed to a verdict for the plaintiff containing no such reservations as they have attempted to make.

Another reason against allowing the judgment to stand is, that the verdict is not sufficiently certain to stand as a final decision of the special matters with which the verdict deals. It leaves it to be determined hereafter what crops were "sown before service of notice," and it attempts to pass upon matters not in issue. It is of the gravest importance that, when a final judgment is rendered, the record shall be definite and certain, and show unequivocally what matters have been adjudicated, and that the decision shall be a finality in regard to the matters in issue.

Any attempt to sustain such a departure from rule as is here presented, could scarcely fail to involve the parties in greater uncertainty and difficulty than existed at the commencement of the action.

Let the judgment be reversed and the cause remanded for a new trial in the justice's court.

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1871.

GEO. A. PEASE v. DOLPHUS B. HANNAH.

EJECTMENT—PLEADING.—In an action for the recovery of the possession of real property, it is not necessary for the plaintiff to set out his muniments of title.

IDEM.—Where a defendant set up a title in himself to an undivided interest, he was required to specify what interest or share he owns.

REDUNDANCY.—On motion, redundant matter was stricken out.

Mitchell & Dolph, for the plaintiff.

Wait & Gibbs, for the defendant.

THE plaintiff brings his action to recover an undivided half of the premises in question, known as the Caruthers estate. He alleges "that he is the owner in fee simple of the undivided half" of the premises; (describing the land); and adds that he "has been such owner since the fifteenth day of September, 1870, by the following chain of title," and proceeds to set out, according to their legal effect, the muniments of his title. He alleges that "the remaining one-half of said real property is owned by W. C. Johnson and F. O. McCown, who are tenants in common with the plaintiff in the whole of said real property;" that he is entitled to the possession thereof, and that the defendant is wrongfully in possession and wrongfully withholds the same.

The defendant moved to strike out that portion of the complaint relating to the plaintiff's chain of title, and the motion was granted.

The defendants filed an answer denying the allegations of the complaint, and for further answer stating: "That the defendant is rightfully in possession of the land specified in the said complaint, and that he is the owner in fee simple absolute of an undivided interest therein of the value of ten thousand dollars and upwards;" that certain other parties, whom he names, are owners of an undivided interest therein, and that the heirs-at-law of Finice Thomas, deceased, "are the other owners of undivided interests of the real property specified in said complaint."

This further answer the plaintiff objects to, and moves that it be made more specific as the quantity and amount for which the defendant defends, and as to the nature of his estate.

The answer also set out the following:

"The claim of the said plaintiff to an undivided half of the land specified in said complaint is wrongful and fraudulent in whole, and in part in this, that the said plaintiff pretends that the person through whom alone he, the said plaintiff, so claims, is the father and heir-at-law of the said Finice, deceased, when in truth and in fact such person is an imposter, and is not the father or heir-at-law of said Finice, deceased, and never had any interest in any of the land specified in said complaint."

This the plaintiff moved to strike out, as sham and irrelevant.

The motion to make more specific, and the motion to strike out, were granted.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1871.

F. O. McCOWN *et al.* v. D. B. HANNAH *et al.*

JOINDER OF COTENANTS.—In an action for the possession of land the defendant claimed for himself and others, his cotenants; alleging that he was owner of an undivided fifth of the parcel, and claiming to be entitled to the possession of one fifth in his own right, and to the four fifths as cotenant with his said tenants in common: *Held*, that the answer was defective in not giving the names of the alleged tenants in common.

NEW PARTIES.—The names of the alleged tenants in common of the defendant being set out in an amended answer, leave was granted to amend the complaint and to make them defendants. The motion of one of those cotenants, that the action be dismissed as to her, without prejudice, was overruled.

CONTINUANCE.—An issue of fact being joined as to some of the defendants, but as to others the cause not being at issue on a question of fact, the plaintiff submitted a motion to continue for the term because of the absence of witnesses, no motion being yet made to set the case down for trial: *Held*, that the motion was premature.

Mitchell & Dolph, Johnson & McCown, for the plaintiffs.

Aaron E. Wait, A. C. Gibbs and Hill, Thayer & Williams,
for the defendants, *D. B. Hannah et al.*

Wm. Strong, for the defendants, *Caroline Worth et al.*

THIS is an action for an undivided fourth of the tract of land known as the Caruthers tract. The parcel was originally six hundred and forty acres; a portion of it has been sold at administrator's sale as city lots, and the action is for the residue. The plaintiff alleges that he is owner in fee of one undivided fourth of the premises, that W. C. Johnson and James Moore are owners in fee of three fourths, and tenants in common with him of the whole premises, that said Johnson so owns an undivided fourth and said Moore and others an undivided half thereof. That the plaintiff is entitled to the possession thereof, "and that the defendant, D. B. Hannah, wrongfully withholds the same from him, the said plaintiff, to his damage in the sum of \$500."

The defendant, D. B. Hannah, answered, alleging that he and certain persons other than those mentioned in the complaint were tenants in common of the said premises and owners thereof in fee. That the said Hannah was owner in fee of one undivided fifth of said premises, and that his said cotenants were owners in fee of the other four fifths of the said premises. And that as such owner and cotenant he was lawfully in possession of the said premises, and that he defended for the whole thereof. The defendant demurred to the answer, as not stating sufficient facts to constitute a defense.

It was held, that to enable the defendant to defend for the whole of the premises, including the undivided interests of the cotenants, with or under whom he claims, the defendant should disclose the names of his cotenants or state in his answer why the names are not set out. An amended answer was filed setting out the names of divers persons as cotenants with the defendant, and specifying the share claimed by each in the premises, and also referring to other persons who are not named, and declaring them to be

owners of an undivided interest in said premises in fee, and cotenants with the defendants, and declaring that their names are unknown to the defendant. The defendant moved for leave to amend his complaint, to include as defendants the persons so designated in the defendant's answer.

Messrs. Wait & Gibbs, for the defendant, Hannah, in opposition to the motion, cite section 314 of the code, to the effect that "a defendant who is in actual possession may for answer plead that he is in possession only as tenant of another, naming him and his place of residence," and if the landlord do not apply to be made defendant, "he shall be made defendant, if the plaintiff require it."

The court expressed the opinion that this case is within the intent and meaning of that section, that as to the four fifths, the defendant was seeking to establish a right to the possession as cotenant of others, and his possession is virtually the possession of those, as the possession of a tenant in the ordinary sense of that word is the possession of the landlord; that virtually the defendant is claiming the four fifths as tenants of the persons designated, that if he succeeds in establishing his defense his success will inure to their benefit, and that there is the same reason for making them parties, in order that they may be bound by the judgment if it proves to be against their claims, that there is in case of an ordinary tenancy, for bringing in the landlord. It was accordingly *held*, that leave to amend should be granted.

Caroline Worth, one of the defendants, thus made a party, being served, moved that the action be dismissed as to her, without prejudice to her rights in a future action or suit.

Wm. Strong, Esq., for the defendant, Caroline Worth, urged in support of the motion: That, aside from the provisions of statute, ejectment afforded a summary mode of obtaining the possession, and that the action affected the possession only. That if the plaintiff claims to proceed under the statute to obtain a right, the statute must be construed strictly. That the plaintiff is not within the statute, because the defendant, Hannah, does not plead "that he is in possession *only* as the tenant of another," but also claims in his own right.

BY THE COURT, UPTON, J. Formerly the action of ejectment afforded a means of obtaining possession, but was not decisive of ultimate rights of the parties. The evident intent of the code is to change the character of the action in this respect, and to so change the action as to enable the parties by one action to obtain the possession and a judgment that shall determine all questions relating to the title, and which shall be a bar to any future proceeding in relation to that matter. This is not a statute conferring a right, but one dealing with the remedy for an injury to, or an invasion of, a right. The plaintiff does not come into court with a purpose to create a right by aid of the statute, hence it is not a case where a right is created by statute and where the statute must for that reason be construed strictly. It is a statute that changes the mode of obtaining a remedy, and being a remedial statute, it must be so construed as to carry out the intention of the legislature according to the spirit and meaning of the act, to be ascertained by the ordinary rules of construction.

It is true there is one fifth interest for which the defendant, Hannah, defends in his own right, and as to that interest he does not defend as tenant of another. But since a tenant in common in possession, is rightfully in possession of the whole, and may hold the whole, because he is tenant in common, Hannah has a right to defend for the four fifths as well as for the one fifth, and yet he does not own in his own right the fee in all that he has a right to possess. He owns but one fifth, and but for the tenancy he could possess in his own exclusive right only one fifth. It is only through his relation to his cotenants that he may possess the whole, or defend for more than one fifth. As to the four fifths I think he defends as tenant *only* within the meaning of section 314 of the code, and I think it is unreasonable to suppose that the legislature intended to make such case an exception, leaving it unprovided for, and thus compel a plaintiff to litigate for the whole premises successively, in one action after another, with several tenants in common. The motion to dismiss as to Caroline Worth, without prejudice, was overruled.

On the first day of the present term the plaintiff filed a motion and an affidavit for a continuance. On the sixth day of the term he brought the motion on for argument. The motion was opposed by Hannah and such other defendants as had answered, Caroline Worth and two other defendants were still entitled to time in which to answer, and they did not appear to the motion. *It was held*, that the motion was premature.

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1871.

DAVID TAGGART v. ORVILLE RISLEY *et al.*

WARRANTY.—One who is bound by a covenant of general warranty can not set up an after acquired title.

AVOIDANCE.—An answer that seeks to avoid the force of an alleged covenant of warranty, by a statement that the covenantor did not undertake to convey any greater interest in the premises than one fifth, does not allege material fact.

THE complaint, after alleging that the land in question had been conveyed by W. W. Chapman to the defendant, Orville Risley, states that the said Orville Risley and his wife for a valuable consideration conveyed the said lot to Charles Goodnough, (the plaintiff's grantor), by their deed duly executed and delivered. And that the said Orville Risley and his said wife in and by their said deed covenanted as follows: "And the said parties of the first part for themselves and their heirs, the said premises in the quiet and peaceable possession of the said party of the second part his heirs and assigns, against the said parties of the first part and their heirs, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend."

The answer sets up that before the time of making the said deed to Goodnough, in December, 1860, the said defendant, Orville Risley, had acquired but an undivided one fifth part of the said lot. That the said W. W. Chapman,

at the time of executing his said deed, owned but one fifth part thereof. And that the said Risley was the successor in interest to the said Chapman, and that by his said deed to said Goodnough he "did not undertake to convey any greater interest" than the said undivided one fifth part of the said lot 7.

It appears by the complaint that Daniel H. Lownsdale conveyed the same lot to the defendant Risley, by a deed executed May 30, 1861. Upon this last deed the defendant Risley relies, as an after acquired title, to four undivided fifths of the premises. The plaintiff demurred to the answer

Mitchell & Dolph, for the plaintiff.

W. Lair Hill, for the defendant.

By THE COURT, UPTON, J. The assertion that the defendant "did not undertake to convey any greater interest" than one fifth, is not a denial of a material allegation of the complaint; nor is it a statement of new matter in avoidance, upon which an issue of fact can be taken. The answer admits that the defendant Risley made the covenant set up in the complaint. The covenant differs from a covenant of general warranty only in limiting the persons against whose claims the grantor covenants; and he especially includes himself.

The case is clearly within the rule that prohibits one who is bound by a covenant of general warranty, from setting up an after acquired title. The phrase "the said premises," as ordinarily used in deeds of conveyance, is construed to mean the lands previously described in the instrument; and when there are no limiting words in the instrument, tending to show that the contract was for less than the whole of the parcel described, a defendant who admits the execution of the covenant, does not raise a material issue of fact by stating that he did not undertake to convey any greater interest than one fifth. The demurrer to the answer should be sustained.

CIRCUIT COURT FOR CLACKAMAS COUNTY, MARCH TERM, 1871.

DAVID WILLS v. DANIEL WILSON AND W. C. WILSON.

ALTERATION.—Adding to a promissory note the words “in gold coin,” is a material alteration.

NOTICE.—If the plaintiff took the note knowing that it was altered without the consent of one of the makers, he can not recover against the maker not consenting.

IDEM.—If it is so altered, and the plaintiff before receiving the altered note was put upon inquiry, he cannot recover against the party who did not consent to the alteration.

IGNORANCE.—Ignorance of the law will not excuse.

ALTERATION.—If the plaintiff was without fault and was deceived, and received the note believing that the note was altered by both the makers, when in fact one of the makers did not authorize the alteration, the plaintiff is entitled to recover against the latter upon the original note, to the same extent as if no alteration had been made.

THIS was an action on a promissory note. The answer does not deny the consideration or the execution of a promissory note for the amount claimed, but the separate answer of Daniel Wilson sets up, that since the execution of the note, the plaintiff and W. C. Wilson had altered the note by adding to it the words, “in gold coin.”

The replication denies that the alteration was made by the plaintiff, but alleges that it was made by W. C. Wilson; and sets up, in substance, that the plaintiff was deceived by W. C. Wilson and made to believe that the alteration was made with the consent of both defendants.

The evidence disclosed that W. C. Wilson purchased sheep of the plaintiff, and that Daniel Wilson, the father of W. C. Wilson, signed a note with him for the purchase price. The plaintiff, after having the note two or three days, discovered that it was not made payable in coin, and went to the premises where both the defendants lived, and finding W. C. Wilson in the street, asked him for a new note. W. C. Wilson took the note into the house, leaving the plaintiff in the street, and shortly came out with the note, with the words “in gold coin” added. The plaintiff received the altered note and kept it some years after ma-

turity, and then brought this action. The plaintiff first declared upon it as a note for coin; a trial was had, and the jury disagreed. The plaintiff then amended his pleading, and now claims to recover on the note as originally made.

A. F. Forbes, for the plaintiff.

Mitchell & Dolph, for the defendant.

After the jury were sworn and the case stated to the jury, the defendant moved the court for a judgment on the pleadings. The motion was overruled.

After the close of the plaintiff's testimony, the defendant moved for a nonsuit.

It was held that it was a question of fact for the jury, whether the plaintiff, when the note was returned to him, had reason to believe that the note was altered by the consent of Daniel Wilson, and the motion was overruled.

The plaintiff, having requested that the instructions to the jury be given in writing, requested the following, which the court declined to give:

"If the alteration was not made by W. C. Wilson and by the plaintiff, or by the concurrence of the plaintiff, the plaintiff is entitled to recover.

"If the change was innocently made, without any bad intent on the part of the plaintiff Wills, and not by him or by his concurrence, the plaintiff is entitled to recover."

The defendant Daniel Wilson asked the following instructions, which the court *declined* to give:

"Under the pleadings in this case, the plaintiff cannot deny that he consented to the alteration of the note.

"If the note was altered after its execution, and such alteration was made without the knowledge or consent of Daniel Wilson, the plaintiff cannot recover upon such note, as it was, either before or after alteration."

"The taking and retaining the note by the plaintiff from W. C. Wilson, as altered, was an adoption of the act of altering the same by the plaintiff, if the jury are satisfied that he did so take and retain the same. The plaintiff taking the altered note was bound to know that the alteration was assented to by Daniel Wilson as well as by W. C. Wilson."

The following instructions requested by the defendant, were given:

"Alteration by adding to this note the words 'in gold coin' was a material alteration.

"The alteration of the note by W. C. Wilson, at the request of the plaintiff, without the knowledge or authority of Daniel Wilson, if done, would have been an unlawful act."

"It is a presumption of law that an unlawful act was done with an unlawful intent."

THE COURT. UPTON, J. then instructed as follows:

If the plaintiff had reason to believe, and did believe, at the time the note was altered, that both the defendants consented to the alteration, and the circumstances were not such as to put a reasonable man on inquiry as to the consent of Daniel Wilson, the plaintiff is entitled to recover to the same extent as if the note was not altered.

But if W. C. Wilson acted without authority, and the plaintiff was not deceived, or if the circumstances were such that a reasonable man would have suspected or believed the act to be done without Daniel Wilson's consent, the plaintiff, by accepting the altered notes, released Daniel Wilson. In that case, the alteration can not be disregarded as innocently made. If the plaintiff was ignorant of the law, and did not know the effect of altering the note without the consent of Daniel Wilson, that circumstance is not available. Ignorance of the law cannot operate as an excuse, nor change the rights of the parties.

If the plaintiff was deceived about the facts, and believed the alteration was made with the consent of both defendants, and had no reason to suspect the contrary, his accepting the altered note will not amount to entering into a new contract with W. C. Wilson alone, and will not discharge Daniel Wilson from liability.

When the circumstances are such as would excite suspicion and naturally attract the attention, a party will be presumed to have been put upon inquiry, and if he does not inquire he will be presumed to have known the facts.

The jury returned a verdict for the defendant.

CIRCUIT COURT FOR CLACKAMAS COUNTY, MARCH TERM, 1871.

THE OREGON AND CALIFORNIA RAILROAD COMPANY
v. WILLIAM BARLOW AND WIFE.

RIGHT OF WAY—ACTION TO CONDEMN LANDS—PRACTICE.—In an action to condemn lands to the use of a railroad company, when the issue is formed by a statement in the complaint that the defendant's damages do not exceed the sum of two hundred dollars, and a statement in the answer that the land sought to be appropriated is of the value of \$234, and that the additional damages to the defendant resulting from such appropriation will amount to \$2,516, the defendant was permitted to open and close the case.

ESTIMATE OF VALUE.—The amount to be paid for the land appropriated should be its value at the commencement of the action.

IDEM.—The estimate should not include the value of timber on the defendants' adjacent lands, cut down and destroyed by the plaintiff.

DANGER FROM FIRE.—If a railroad is to be constructed so near to the defendants' barns as to improperly expose them to danger from fire from passing trains, that is a proper subject to be considered by the jury in estimating damages. If the danger is such as to render it advisable to remove the barns, the cost of removal is a proper subject to be considered by the jury in estimating damages.

PONDING WATER.—If, by an improper construction of the railroad now built, the road bed acts as a dam and improperly ponds water and causes it to overflow the defendants' lands, their remedy is by a proceeding to prevent or remove the obstruction, and it is not a ground for additional damages in this proceeding. The damages to be assessed are such as will result from a proper construction of the road.

IDEM.—If a proper construction of the road will pond water upon the defendants' adjacent land, the overflow is a proper subject to be considered in estimating damages.

PROTEST.—Money paid into court by the plaintiff to enable the court to render judgment in pursuance of the verdict, was, on motion, ordered paid to the defendant, notwithstanding it is accompanied by a protest.

THIS was a proceeding under the statute to condemn and appropriate a parcel of the defendants' land for the use of the plaintiff's railroad.

The complaint describes this parcel of 4 69-100th acres of land, sixty feet in width, by metes and bounds, and "as lands of the defendants;" the initial of the boundary being designated as a point "on the northern boundary of the defendants' land claim." Other than this the pleadings do not show what land is owned by the defendants.

The complaint states that, believing that two hundred dollars was sufficient to compensate the defendants for the land and all damages, etc., the plaintiff had tendered that amount, etc., making a formal plea of tender.

The answer averred that the true value of the 4 69-100 acres of land was \$234, and that if said land was taken and appropriated, the said defendants would be thereby damaged in the sum of \$2,516, in addition to the value of the land taken.

The plaintiff moved that the defendants be required to make their answer more specific, by stating in what manner the appropriation of land would cause them damage.

Mitchell & Dolph, for the plaintiff.

Johnson & McCown and *Charles Warren*, for the defendants.

UPTON, J., overruled the motion, and the plaintiff replied denying that the parcel of land was worth more than \$200, and denying that the construction of the road would cause damage to the defendants; and alleging that it would cause benefits to the defendants greater than the damages claimed by them.

The cause coming on for trial, the defendants claimed the affirmative of the issues, and asked to be allowed to open and close the case. This was granted, the plaintiff objecting.

The jury viewed the premises.

On the trial the defendant asked his witness the following questions:

What was the value of the strip of land described in the complaint *at the time this action was commenced*?

The plaintiff objected that it was irrelevant, immaterial and incompetent, and claimed that the question should be confined to the value at the time the plaintiff took possession of or appropriated the land, and the estimate should be irrespective of any increased value by reason of the proposed improvement.

It was held, that the witness may be asked what it was worth at the commencement of this proceeding. (1)

(1) A corporation, named the Oregon Central Railroad Company, had commenced the construction of this line of road and had transferred the road to the plaintiff. The road had been constructed over this land more than a year previous to the commencement of this action; and when this question arose, it was in evidence, that the road had been constructed, but it was not shown who constructed it, nor that any transfer had been made.

The defendant testified that he had two rows of black walnut trees along the margins of an avenue leading from his house, and that six of those trees were grown on the sixty feet sought to be appropriated.

His counsel asked of him, what were those six trees worth?

To this question the plaintiff objected. That the witness had already given his opinion of the value of the land at an amount higher than that claimed in the answer, and that the trees being part and parcel of the land sought to be appropriated, it was not competent for the witness to give an estimate of the value of the trees separately.

It was held, that estimating the value of the trees was one mode of coming at the value of the land including the trees. That there is no rule preventing a witness from testifying to a higher value than that claimed in the pleading, although the jury are limited to that amount in rendering their verdict.

The witness was permitted to answer, and said the trees were worth from \$50 to \$100 each. (1)

The defendant proved that he had two farm barns standing one hundred and seventy-eight feet from the centre of the railroad track, and that the barnyard in which they stood extended to within eighty-nine feet of the track. The defendant offered evidence tending to prove that the barns were in danger of being burned by passing locomotives. To this evidence the plaintiff objected, that the probable or possible damage was too remote; that it was only a possibility; and that if the plaintiff caused the destruction of the defendant's barns by fire, the plaintiff would be liable in an action for damages.

It was argued by the defendants' counsel, that although the defendants might recover in a future action if they were guilty of no contributory negligence, yet if they continued to use the barns as heretofore, if there was danger, the dan-

(1) It was virtually conceded by the defendant's counsel, before the close of the trial, that as the walnut trees were destroyed before the commencement of this action, a separate action would lie for destroying the trees, and that he was not entitled to recover their value in this action; and the evidence on that subject was subsequently ruled out with the defendant's consent.

ger would be such that it would be clearly a case of contributory negligence, and if the defendants were compelled to remove their barns, or change their mode of using them, that was a reason for claiming damages in this proceeding.

The objection was overruled. The defendant introduced evidence tending to prove that the danger was so great as to render it advisable to remove the barns. The defendant then asked a witness the cost of removing the barns. The plaintiff objected, on the grounds before stated.

The objection was overruled.

The evidence tended to show that a few acres of the defendants' land being level and nearly or quite surrounded by higher lands, and having no distinct channel through it, was, before the construction of the railroad, in extremely wet weather, covered with water for a few days at a time. That the railroad was constructed across and over the center of this part without a sluice to allow the water to pass under the road, and the road-bed operated as a dam, causing the water to stand higher on the east than on the west side of the railroad, and to stand for a much longer time than formerly on a portion of defendant's land. There was conflicting evidence as to where, and in what direction, was the natural surface flow or drainage of this water, before the construction of the railroad; and as to the proper mode of relieving the land of surplus water after the construction. The cost of drainage by a ditch parallel to the railroad was variously estimated; the opinions of witnesses ranging from \$10 to \$180. The cost of a good sluice under the railroad was estimated to be \$75.

The plaintiff moved that all the evidence on the subject of the overflow be ruled out as irrelevant.

The motion was overruled.

Of the written instructions presented by the plaintiff, the court *declined* to give the following:

"The defendants cannot recover anything in this case by reason of any probable danger of fire to the barns of the defendant situated on adjacent lands outside the sixty feet sought to be appropriated.

"The defendants are not entitled to recover for any damage done to adjacent lands of defendants, outside of the

sixty feet sought to be appropriated, by reason of water dammed back on such lands by the embankment of the railroad.

"In determining the compensation to which the defendants are entitled for the strip of land actually sought to be appropriated, you should find what that strip of land was worth *at the time the plaintiffs took it*, and irrespective of any increased value by reason of the railroad."

The following are the instructions given to the jury:

It will be proper for you to observe a distinction between what is claimed by the defendants as the value of the land which the plaintiff seeks to appropriate, and what is called resulting damages. The defendants are entitled to compensation for the parcel or strip of $4\frac{1}{8}$ acres irrespective of any benefit or advantage to their adjacent lands caused by the proposed improvement or by the construction of the railroad.

But the question whether the defendants are entitled to recover any more than the actual value of the $4\frac{1}{8}$ acres depends upon whether there are resulting damages, aside from this value, exceeding resulting advantages or benefits to the defendants, in consequence of the road.

The plaintiff admits the value of the land described in the complaint to be \$200, and the defendant claims that it is worth \$234; of course you cannot place its value at less than \$200, nor more than \$234.

In estimating its value you will find what it was worth at the time this proceeding was commenced.

If you believe from the evidence that the defendant's barns are so situated as to be unreasonably exposed to danger of fire from passing locomotives, that is a proper subject for you to consider in determining whether the resulting damages are greater than the benefits.

If you think they are in such danger that it would be advisable to remove them from their present position, the cost of such removal is a proper subject for consideration in making your estimates.

The defendant cannot recover in this action any damages or compensation for walnut trees. All evidence on that subject has been ruled out, and the subject has been with-

drawn from your consideration. It has been ruled out because, as to the land sought to be appropriated, you are to find its value at the time this action was commenced, and not at the time the plaintiff took possession. Such growing trees are a part of the land, and if they were to be valued at all in the case, they would be valued as land, and it is admitted that when this proceeding was commenced the walnut trees were not in existence. If the defendant has an unsatisfied demand for taking those trees, he must recover, if at all, in another action; for, if we should attempt to include that matter in this case, the judgment in this case would be no bar to another action for the same thing; and you are to treat the case as if there had been no such walnut trees.

If the plaintiff has neglected to put in a sluice, where one was needed to prevent the plaintiff's work from causing an overflow of the defendants' land, the defendants' remedy is by a proceeding to compel the plaintiff to put in the necessary sluice; and if such is the cause of the alleged overflow, the defendants cannot recover any damages in this proceeding because of such neglect. The damages to be considered in this case are such as will be caused by constructing a railroad in a proper manner. If the railroad now built is improperly constructed, and an overflow is caused by improperly neglecting to put in a sluice by which the plaintiff ought to have avoided such overflow, the damage thus caused can not be considered in this case, but the defendants' remedy must be by proceedings to compel the plaintiff to put in the sluices.

If you think some injury is done to the defendants by ponding water upon their land adjacent to the sixty feet, and that a sluice is not necessary, such injury is a proper subject to be considered in estimating damages. In other words, if a proper construction of the road will pond water upon the defendants' adjacent land, the overflow is a proper subject to be considered in estimating damages.

The court has refused to admit evidence that the plaintiffs while constructing the road, cut down or destroyed timber growing on lands adjacent to the sixty feet sought to be appropriated, and you should not permit anything that has

been said on that subject to influence your verdict. If the defendants have suffered any injury in that respect, the law affords them a remedy in another proceeding, and the nature of this case is such that no record can be legally made to show that such damages have been considered and determined in this proceeding.

The opinions of experts or persons skilled in a particular branch of business have been given in evidence, to aid you in arriving at correct conclusions on some points with which they may be more familiar than you can be.

In determining any controverted question of this kind, you will give to their opinions such consideration as is proper, remembering that such opinions are not offered to control your judgment, but to instruct and to convince, and thus enable you to arrive at the truth. In the end, it is the opinion of the jury, upon which the determination of the point is to rest. After carefully considering these opinions with all other evidence, and giving them due weight, it rests upon you to decide according to your convictions.

The jury returned a verdict in favor of the plaintiff for the appropriation of the land described in the complaint, and in favor of the defendants for \$700 damages.

The plaintiff filed a motion for a new trial, assigning errors of law and insufficiency of the evidence, which was submitted without argument, and overruled.

The plaintiff paid into the hands of the clerk \$700, together with money sufficient to satisfy the costs, and at the same time filed a paper stating that the plaintiff pays the same "under protest and without waiving the right to appeal from the judgment rendered, or to be rendered, herein," and also notifying the clerk not to pay the money to the defendant until the case was determined on appeal.

A judgment was rendered, on the plaintiff's motion, in accordance with the verdict. Afterwards the defendants' attorney filed an affidavit stating that he had demanded the said \$700 of the clerk, and that the clerk refused to pay the same to the defendants, and moved the court for an order on the clerk, directing him to deliver that sum to the defendants; and the question having been argued and submitted, it was ordered that the clerk pay the \$700 to the defendants.

CIRCUIT COURT FOR WASHINGTON COUNTY, MAY TERM, 1871.

WM. B. CHATFIELD v. WASHINGTON COUNTY.

Re-enacting the law fixing the salary of the county treasurer, does not deprive him of the right to a percentage for receiving school funds, allowed to him by a statute not referred to in the re-enactment.

W. D. Hare, for the plaintiff.

G. H. Durham, for the defendant.

UNDER ss. 254, 5 and 6 of the code, this case was submitted, upon an agreed statement of facts, to the circuit court. UPTON, J., presiding.

The parties state that the plaintiff is treasurer of Washington County, and as such, has in his hands \$6,000, collected by him, and belonging to what is known as the irreducible school fund, and that he has received no compensation for his services in that relation, aside from the salary which he draws as treasurer.

In 1856, an act was passed which authorized the board of school land commissioners "to demand the services of any county officer in any business relating to the school lands and funds in his county;" and provides that the county treasurer, if so required, shall receive, receipt for, and safely keep such funds, and that "county treasurers, for their services under this act, shall receive out of the general fund one per cent. of the amount of school moneys received by them.

A law of 1854 gave to the treasurer of Washington County a salary of three hundred dollars. An act was passed in 1868, making no allusion to the act of 1866, but amending and re-enacting the section that fixed the salaries of county treasurers. It changed the salaries of some other treasurers, but left that of the Washington County treasurer as before—three hundred dollars.

It was held, that the amendment made in 1868 did not deprive the treasurer of Washington County of the right to receive one per cent., although the act of 1854, and the amendment made in 1868, both speak of the salary "as a full compensation for the services" of county treasurers.

CIRCUIT COURT FOR WASHINGTON COUNTY, MAY TERM, 1871.

J. H. HOLLISTER RESPONDENT v. CHARLES HAGUI,
APPELLANT.

COST ON APPEAL.—Where on appeal from a justice's court the respondent obtains a verdict for less than he recovered in a justice's court, the costs on appeal are in the discretion of the court.

THE plaintiff had obtained judgment in a justice's court for \$50, for the reasonable value of keeping the defendant's horse. The defendant had set up a special contract and a set-off.

The defendant appealed, and in this court the plaintiff obtained a verdict for \$25.

The plaintiff's costs in the justice's court were about \$45, and in this court the plaintiff filed a costs bill amounting to \$36, besides the costs in the court below.

The defendant moved for a judgment for costs.

R. E. Bybee, for the defendant.

There is no special provision in the justice's act, and by section 539 of the practice act, in this class of actions, the defendant is entitled to costs, unless the plaintiff recovers fifty dollars or more.

W. D. Hare, for the plaintiff, claimed that actions 539, 540 and 541, apply only to cases commenced in the county or circuit court.

UPTON, J. *Held*, that this is a case where the judgment appealed from "is modified," within the meaning of the last clause of section 542 of the general practice act, which provides: "But where on appeal to the supreme or *circuit* court a new trial is ordered or a decision given modifying the judgment appealed from, the costs on appeal shall be allowed or not in the discretion of the appellate court."

That, in general, costs follow the judgment when the statute is silent; and when the statute leaves the matter to the discretion of the court, such should be the practice, un-

less there are special reasons for varying the rule. That in this case the defendant had it in his power to avoid all costs by tendering the amount that has been found due; and that this is a sufficient reason for not awarding costs in his favor. But that inasmuch as it is shown that there was some grounds for his appeal, the plaintiff's cost bill should not be allowed in full.

The plaintiff was allowed the costs he recovered in the court below, and \$20 of the costs on appeal.

CIRCUIT COURT FOR WASHINGTON COUNTY, MAY TERM, 1871.

JOHN CHIPMAN v. WINSTON BRONSON.

NOTICE OF APPEAL.—Where the notice of appeal specified a judgment for \$57.75, and the transcript disclosed a judgment for \$52.50, the appeal was dismissed.

THE notice of appeal described the judgment in the words, "from a judgment rendered in your favor against me on the 20th day of March, 1871, by R. B. Willmot, justice of the peace, * * * for \$57.75 and costs."

The transcript disclosed a judgment for \$52.50.

Hyer Jackson, for the respondent, moved to dismiss the appeal for insufficiency of the notice.

Hare & Tongue, for the appellant, claimed that a verdict had been rendered for \$57.75, and that either there was a mistake in the transcript, or the justice had inadvertently entered judgment for a wrong amount. The transcript contained no copy of a verdict. Time was allowed for correcting the transcript.

No correction being made, the motion was argued and submitted.

BY THE COURT. UPTON, J. This court acquires jurisdiction through the notice of appeal. It is necessary that the notice should identify the case with reasonable certainty to

bring the cause into this court; and the identification should be such, that when the record is made up, the notice will of itself show that this is the same cause that was pending in the court below. It may not be necessary in all cases to state the amount of the judgment appealed from, but if it is stated it should be stated correctly.

If the justice of the peace had rendered judgment for \$57.75 when no more than \$52.50 was claimed, this court would be bound to set aside the judgment or direct it to be corrected. The law undoubtedly contemplates as great strictness in this court as in the justices court.

In the case of such an error disclosed by the transcript from a justices court, this court would have jurisdiction and if it could see that no substantial wrong would be done, could correct the error by requiring the excess to be remitted. But in this case, unless the law has been complied with, this court has not acquired jurisdiction. It is not a case of mere error that may be disregarded if no substantial right is prejudiced, or on the assumption that the appellant acted in good faith and that no one has been misled, because the jurisdiction does not depend alone upon what the parties intended to do, but upon what has been done.

I think the misdescription of the judgment is fatal and that the appeal should be dismissed.

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CIRCUIT COURT FOR WASHINGTON COUNTY, MAY TERM, 1871.

— ALBEE v. — ALBEE.

PARENT AND CHILD—CONSIDERATION.—Where a father gives his minor son the privilege of working for himself and having whatever wages he may earn, and afterwards the minor voluntarily returns and labors on his father's farm until he becomes twenty-one years of age, the law does not imply a promise on the part of the father to pay wages to the son for the time during the minority.

IMPLIED PROMISE.—Where a son, on becoming of age, remains with his father and works for his father as an ordinary laborer on a farm under a parol

contract that he should receive land for his pay, and he does not receive the land, he is entitled to recover the reasonable value of his labor.

PLEADING—NEGLIGENCE.—In an action for work and labor, if the defendant seeks to show that the plaintiff did not labor diligently, he should raise the question by his answer.

PLEADING—PROMISE TO SELL LAND.—Although it is necessary that an agreement for the sale of land should be in writing, it is not necessary that the pleading should expressly aver that the agreement was reduced to writing.

THE complaint was for \$40 per month, alleged to be the reasonable value of labor done by the plaintiff for the defendant at his request, from a specified day in 1868, for a period of two years.

The answer, in regard to each allegation of the complaint, contained a denial qualified by the words "except as hereinafter set forth."

The answer proceeded to set forth, that the plaintiff was the defendant's son; that during all the time set forth in the complaint, except the last six months thereof, the plaintiff was a minor.

That before the time mentioned in the complaint, the plaintiff had been a wayward and bad boy, and that he had wrongfully left his father's house. That the father, in hopes of benefiting his son, and to induce him to return to, and remain at his father's house, at the time first mentioned, mutually agreed with his son, the plaintiff, that the plaintiff should remain and work on the defendant's farm during the defendant's life. And that he should have as compensation all the proceeds of the farm except such as was necessary for the defendant's support, and at the defendant's death, should have the farm. And that all the work that had been done by the plaintiff, had been done for the plaintiff's benefit on said farm in pursuance of the said agreement.

The answer also stated that the plaintiff's labor was worth no more than the board, clothes and spending money furnished by the defendant to the plaintiff while the work was being done.

The plaintiff moved to strike out that part of the answer relating to the character of the plaintiff, as irrelevant and scandalous.

The motion was sustained.

The plaintiff demurred to the answer; that it did not appear that the promise was in writing.

UPTON, J. *Held*, that although a promise for the sale of land is void unless in writing, it is not necessary to declare in the pleading that the promise is in writing.

The demurrer was overruled.

The replication denied making the contract set forth in the answer, admitted that such a plan had been talked of, during the plaintiff's minority, but averred that the defendant refused to enter into such a contract. And averred that the defendant had previously given the plaintiff his time.

R. E. Bybee and B. Killin, for the plaintiff.

Hare & Tongue, for the defendant.

A jury being impaneled and sworn, the plaintiff, called on his own behalf as a witness, was asked:

How long did you work for the defendant?

Mr. Hare—I object, on the ground of irrelevancy. It appears by the pleadings that the time was six months after his minority, and eighteen months before.

The objection was sustained.

Q. How much was the labor worth?

Mr. Hare—I object to proving the value before the time of his minority.

Q. How much was it worth during the last six months?

A. It was worth \$40 per month.

The defendant was called as a witness on his own behalf.

Q. What was the bargain under which the plaintiff went to work for you?

Mr. Killin—I object to parol evidence of the contract set up in the complaint.

Mr. Tongue—We will show that the plaintiff went into possession under the contract.

The objection was sustained.

Q. What was the plaintiff's board worth?

Mr. Killin—I object; there is no issue as to the price of board.

Mr. Hare—The answer denies that the work was worth more than the board, clothes and money furnished.

The objection was sustained.

Q. What was the reasonable value of the plaintiff's labor?

A. It was not worth anything.

Q. State what kind of work he did on the farm?

The question was objected to as irrelevant, and the objection sustained.

——— *Albee*, sworn. I am a brother of the plaintiff. I lived on the farm most of the two years in question.

Q. How much was the work that the plaintiff did during the last six months worth?

Mr. Killin—I object to the question. There is no issue but the plaintiff did good work.

Mr. Hare—We have denied that the work was worth anything, except as in the answer stated; and we have stated that it was not worth so much as his board, and clothes, and the money furnished him. I think we are entitled to show that he was living with the old gentleman as he did before he became of age, and was not at work but a small part of the time.

By the Court—I think the kind or quality of service rendered is not put in issue. The real question to be determined is the reasonable value of farm labor at the time and place.

Q. What was the wages of farm hands at that time?

A. About \$25 per month.

The Court gave the following instructions:

The law has provided that a contract for the sale of land which is not reduced to writing is void. For that reason, the contract which the defendant says he made, cannot be enforced, and we are compelled to treat the case as if they had not attempted to make the contract; or, at least, we cannot determine the compensation according to the terms of the contract the defendant sets up. The plaintiff claims that he ought to have wages for eighteen months of the time, for the reason, that before that his father had given him his time. If he had worked for a third party, that

might be a reason for his being entitled to receive the money earned, but when he voluntarily returned to his father, the law does not raise a presumption that his father promised to pay him what his labor was worth; it is more reasonable to presume that he and his father renewed their former positions toward each other. You will, therefore, disregard all that is said about the labor performed before the plaintiff became of age.

The plaintiff can only recover for work done after he became twenty-one years old. The parties have agreed that he worked six months after that time; and there is but one question of fact in dispute; that is: what was then the reasonable value of labor in the business of farming?

There has been some attempt to show that the plaintiff did not work continuously, and that he did not earn the wages of an ordinary farm hand; but that question cannot be tried in this case, and all evidence on that subject, when objected to, has been ruled out. It would be unreasonable and extremely inconvenient, if on every occasion on which a person sues for wages, he was compelled to be prepared to produce an array of witnesses to prove that he had lost no time, and that he had done all his work skillfully. The law has accordingly provided, that if the plaintiff is to meet these questions, the defendant must apprise him in his answer that defendant will dispute his skill and diligence. It is upon this ground that all evidence touching the kind or quantity of labor has been ruled out. The plaintiff is entitled to recover for six months' labor, at the customary rate of wages at the time and place.

The plaintiff had a verdict for \$150.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1871.

W. W. CHAPMAN v. JAMES H. WILBUR.

TRUSTEE.—Where one in possession, without title, conveyed two adjacent blocks of land in trust, "for the purpose of erecting an academy *thereon* and *therewith*," with covenants for further assurance, and having afterwards acquired the legal title, executed a deed purporting to be confirmatory of the former deed, and purporting to recite its substance, but which describes the former deed as a deed conveying the "land for the purpose of establishing *thereon* a seminary of learning to be divided into a male and female academy;" and which in terms grants the land in trust, "for the uses and purposes aforesaid." *Held*, that the change in language does not denote an agreement on the part of the *cestuis que trust* to change the nature of the trust.

VOLUNTARY CONVEYANCE.—The execution of an assignment by the trustee (he being the grantee) which was written on the back of the confirmatory deed, was held not to be conclusive proof that the trustee knew the contents of the confirmatory deed.

RATIFICATION.—Upon proof that the trustee had no knowledge of a discrepancy between the terms of the original deed and those of the confirmatory deed, and that the latter was in the custody of another, and was never in the custody of the trustee, except for the purpose of signing the release written thereon. *Held*, that such signing was not a ratification of, or consent to, a change in the character of the trust.

CONSTRUCTION.—In construing contracts, meaning must be given to each of the terms employed if possible.

THIS is a suit to recover a parcel of land, formerly conveyed by the plaintiff, in trust, on the ground of forfeiture by misappropriation.

J. H. Reed and *W. W. Chapman*, for plaintiff.

A. C. Gibbs and *Caples & Moreland*, for defendant.

UPRON, J. This case was referred, and the referee heard the cause and reported a decree in favor of the plaintiff; it is now submitted on the defendant's motion to set aside the report, and on the plaintiff's motion for confirmation.

The following are the material facts: On the 7th day of September, 1850, that is, twenty days before the passage of the donation act, Stephen Coffin, D. H. Lownsdale and W. W. Chapman, being in possession, conveyed two adjacent

blocks of land, known as blocks 205 and 224 in the city of Portland, to "James H. Wilbur, trustee, for the use and benefit of the Methodist Episcopal Church of Oregon" * * * "for the purpose of erecting an academy *thereon and therewith*," * * * "to be by him conveyed to such person as shall be appointed to receive and hold the title for the use and benefit of the Methodist Episcopal Church of Oregon." This deed contained the following: "And we further covenant that if we shall obtain title to said property from the United States, we will convey the same as aforesaid by deed of general warranty. We further covenant to warrant and defend the said property against the claims of all persons claiming by, through or under" us.

Soon after receiving the deed, Wilbur went into possession of the premises, and in concert with the said church erected a building on block 205, and instituted an academy upon it. The plaintiff, about the first day of September, 1853, obtained the legal title to the premises from the United States, and on the tenth day of that month he and his wife executed a deed of the premises to "James H. Wilbur, trustee of the *Oregon Annual Conference* of the Methodist Episcopal Church in Oregon." This deed professes to recite the purport of the former deed and to be confirmatory of it, but departs from its tenor in several particulars.

It states the date of that deed as of the "twenty-fifth of June, 1851," and refers to the grantors as having then "by deed of quitclaim conveyed to the said James H. Wilbur, trustee as aforesaid, the property hereinafter described, for the purpose of establishing *thereon* a seminary of learning, *to be divided into a male and female academy*."

It is not shown to whom this latter deed was delivered, nor with whom it was left at that time, but it was afterwards found in the hands of some one of the several persons interested in maintaining and conducting the academy.

In 1853 a corporation was formed by act of the territorial legislature, called "the board of trustees of the Portland Academy and Female Seminary." This corporation was organized, and its trustees held its first meeting on the 4th

of March, 1854. It is admitted that this corporation is the agent or person duly appointed "to receive and hold the title for the use and benefit of the Methodist Episcopal Church of Oregon," and to manage the affairs of the academy.

Up to about 1853, Mr. Wilbur had continued to act as such agent and trustee, and in the construction of the academy, which was completed in 1851, he had advanced of his own funds over \$5,000. Afterwards the defendant, Wilbur, assigned or transferred the two blocks to the said Board of Trustees of the Portland Academy and Female Seminary, and that Board, having audited the accounts of the defendant, and found a large amount due him on account of advances made by him in constructing the academy building, bargained with him to take block 224 in satisfaction of that claim, and the Board executed a conveyance to him of that block on the 9th of June, 1860; since which time the defendant has held block 224, claiming it to his sole use.

The plaintiff claims that these acts have worked a forfeiture, and that block 224 should revert to the plaintiff. It is claimed that Wilbur, while trustee, accepted the confirmatory deed as a fulfillment of the covenants of the original deed of September 7th, 1850, and that thereupon the rights acquired by means of the first deed merged in the legal title, and the first deed was no longer of any force.

To sustain this position the plaintiff produced, among other proofs, the following endorsement, written on the confirmatory deed:

"I hereby relinquish, convey and give up all my right, title and interest to block No. 205, described in this deed, to the Trustees of the Portland Academy and Female Seminary.

J. H. WILBUR.

"Dated PORTLAND, Aug. 15, 1855."

The evidence shows that the deed had not previously been delivered to Wilbur; but at the time of that endorsement it was produced by some person interested in the affairs of the Academy, at whose request Wilbur made the assignment above set forth; that Wilbur did not then read it or know its contents; and he testifies that he never knew

its contents, or that there was any discrepancy or difference between its terms and those of the deed of Sept. 7th, 1850, until the year 1869. And that he had not had charge of the affairs of the Academy since 1853.

Aside from what appears on the face of the deed and the indorsement, and the fact that about 1855, it was in the hands of some one of the persons having the management of the academy, the court is left to conjecture in regard to its delivery. Several circumstances, and chiefly the error in reciting the date of the original deed, indicate that the original deed was not present when the confirmatory deed was drafted. And there is no doubt the misdescription of the date resulted from mistake. I think it more reasonable, since one of these discrepancies or departures from the letter of the original deed is positively shown to be the result of inadvertency or mistake, to conclude that the other departures from these terms resulted from the same cause, than to hold, without other proof, that the parties mutually agreed to change the character of the trust.

It is claimed that the principal object in changing the terms employed to express the trust, was to provide for maintaining an academy for males on one of the blocks, and an academy for females on the other. The evidence relied upon to support this conclusion, is the language of the second deed above quoted, and the name given to the corporation created by the legislature. The act speaks of the Portland "academy and female seminary;" but the second deed speaks of a "seminary of learning, to be divided into a male and female academy." I can not say that either of these expressions decidedly indicate whether males and females were to be taught in one building or in two; or if in two, whether both buildings were to be erected on one block. The dissimilarity of these names indicates the reverse of a matured plan to change the character and plan of the institution, or the nature of the trust. If a change in the nature of the trust had been decided upon, it is hardly probable that the parties would have left the fact to be inferred from ambiguous expressions contained only in the recitals of the deed; to say nothing as to whether the

trustees had power to make such change, and thus bind the *cestuis que trust*. The discrepancy between the names employed in the act of the legislature, and those in the second deed, as well as the general tenor of the second deed, when compared with the first, indicates inattention to the particulars of the trust, rather than a mature plan of changing its nature.

This conclusion is strengthened by the circumstances that the *cestui que trust* was not consulted, that the prior and subsequent action of the grantees proceeded upon the theory of building but a single academy or seminary, and that, of the many persons now resident here, who then took an active interest in the institution, no one has been produced who recollects hearing of the proposition, or knows any facts tending to show that such a change was contemplated.

When we examine the two deeds for the purpose of determining whether the covenants of the former have been abandoned or merged in the latter, we find that the second deed, which purports to recite the purposes of the first, makes the grant "to the said Rev. James H. Wilbur in trust" * * * "for the uses and purposes *aforesaid*." The phrase, uses and purposes, may as well be referred to the uses and purposes actually expressed in the first deed, as to those erroneously quoted in the second, since the reference makes it necessary to read both deeds together. I cannot think it a reasonable deduction from the deeds, that the parties intended to make the change.

It is not necessary to determine the question whether Mr. Wilbur or the subsequent agents or trustees had the power to make such change without the consent of *cestui que trust*, because the weight of evidence is that they never contemplated the change.

It follows that the covenants expressed in the original deeds are still in force; and that the right of the trustees to sell one of the blocks in order to raise funds with which to erect an academy building depends on the construction of that instrument.

If it was the intention of the parties that a portion of the land should be sold to raise money wherewith to build, it is

not a material question in this case whether the block was sold before the building was erected, or sold in satisfaction of money actually advanced for that purpose in good faith before the sale.

A lengthy investigation was had, with the intent to show that the money had not been advanced in good faith as alleged. But the attempt was not successful. It is shown that the account was audited by the board of trustees, who were appointed in pursuance of law, and whose business it was to pass upon it. This board deemed the account correct, and deemed it for the interest of the institution that the block should be sold to satisfy the demand. The only debatable question presented is whether it was the intention of the parties, as expressed in the conveyance of the land to the trustee, that a part of the land might be sold. The plaintiff is estopped by his covenants and can not object to any use of the land that is in accordance with the terms of the grant.

It is a rule in construing contracts, that meaning must be given to each of the terms employed if possible.

When the parties expressed the purpose of erecting an academy thereon and therewith, they intended something by the words employed; and unless there is some sufficient reason to be found, a court has no more right to reject the word "therewith" as meaningless, than to reject the word "thereon."

It is said the building cannot be erected thereon, that is, on the whole, after one half is sold. Literally, the position is correct, and it is equally true that if none of it is sold a building cannot be erected therewith. Shall the whole contract be rejected because it is impossible to comply with a perfectly literal construction; in other words, because it is impossible at the same time to erect a building on the whole of it, and with the whole of it?

I can see no reason for rejecting the word "therewith," and the only reasonable construction of the language used indicates that a portion of the land would be made use of to procure means with which to erect a building on the residue. This was giving to the trustee no broader dis-

cretion in this respect than was given him in other particulars; as for instance, in regard to the kind and size of the building, the time when it should be commenced and completed, and the part of the premises on which it should be situated.

The report of the referee is set aside, and the decree should be for the defendant.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1871.

THOMAS ATKINSON v. PATRICK MORRISSY.

ESTOPPEL.—Where A., who was mortgagee, having a right to redeem, took from B., who was assignee of a mortgagee in possession, a lease from month to month of the mortgaged premises, A agreeing to pay a monthly rent, "and to quit and give up possession of said premises upon demand at the end of any month;" *Held*, that he was not estopped to set up his right to redeem; and that it is not a necessary inference from the transaction that the parties intended to convert B's claim into a legal title.

REDEMPTION.—In general a mortgagor cannot claim redemption without a tender of the debt. But a distinction is made in cases where the debt or duty is wholly uncertain, and cannot be ascertained but by the judgment of the court.

EQUITY JURISDICTION.—Where the principal object of a suit is to determine a controverted question as to whether an equity of redemption exists, the controversy is sufficient to afford ground of equity jurisdiction.

TENDER.—Where the defendant refused to accept money from the plaintiff, and placed his refusal on the ground that the plaintiff had no right to redeem, the bill was sustained although the plaintiff had neither made a formal tender, nor brought money into court.

IMPROVEMENTS.—Where the mortgagee in possession had placed valuable improvements on the land, the plaintiff consenting that it should be done at his expense, the cost of the improvement was added to the amount otherwise due to the mortgagee.

THE plaintiff seeks to redeem certain premises. The defendant denies the plaintiff's right to redeem, and claims to be owner in fee.

The plaintiff being owner of lots 3, 4, 5, 6 and 7 in block 2, in Frushes' addition to East Portland, mortgaged them to one Thomas Cully, in March, 1869, to secure \$800 and interest.

On the sixth of May, 1869, the plaintiff conveyed lots 3, 4, 5 and 6 of the block to one P. J. Martin by a deed absolute on its face, to secure \$400 and interest, then owing from the plaintiff to Martin.

On the thirtieth of June, 1869, the plaintiff and the defendant entered into a written agreement; the plaintiff agreeing to convey to the defendant lots 5 and 6 in that block, on or before the fifteenth of August, 1869, for \$500 to be paid by or before that time. The plaintiff agreeing that by or before that time he would remove incumbrances from lots 5 and 6. The defendant advanced \$300 to the plaintiff and took a mortgage on lots 3 and 4 for its repayment, but stipulated in the agreement that if the plaintiff complied with the terms of the agreement, the \$300 should apply in payment as part of the purchase price of lots 5 and 6.

The plaintiff paid a portion of the \$400, principal, and the interest owing to Martin, and reduced the amount to \$375.50.

On the 17th of August, the defendant being notified by Martin, of Martin's relations with the plaintiff, paid Martin the \$375.50, and Martin executed to the defendant a deed for lots 3, 4, 5 and 6.

On the 10th of January, 1870, the plaintiff and the defendant signed an instrument, reciting the defendant's purchase, under the deed to Martin, in which instrument the plaintiff agreed to pay the defendant, "for the use and occupation of the premises the rent of twenty dollars a month

* * and to quit and give up possession of the said premises upon demand from said Morrissey, at the end of any month."

Before the commencement of this suit, the plaintiff surrendered the possession of the premises to the defendant.

The plaintiff paid a portion of the mortgage executed to Cully, and on the 14th of January, 1870, the defendant paid the balance due thereon, amounting to \$675.80, and took an assignment from Cully to himself; and he also paid certain mechanics' liens, the taxes on the premises, and made improvements.

He alleges that he is owner in fee; that he has paid upon

said premises money to the amount of \$1,760.00; made repairs to the value of \$686.28; and done work to the value of \$100.00, amounting in all to \$2,546.28.

The case was submitted for final decree on the pleadings and proofs.

Strong & Trimble, for the plaintiff.

Mitchell & Dolph, for the defendant.

UPTON, J. The answer, as originally filed, claimed the absolute title in fee, to lots 3, 4, 5 and 6, by virtue of the deed from the plaintiff to Martin, and from Martin to the defendant. And also claimed lots 5 and 6 by virtue of a purchase under the agreement of date, June 30th, 1869.

To that portion of the answer setting up the latter claim, the plaintiff objected on the grounds:

1st. That it is inconsistent for the defendant to claim an equitable title, and ask a specific performance of an agreement to sell, at the same time that he asserts that he holds the legal title.

2nd. That the allegations of the answer do not show that the defendant had paid the remaining \$200, or show any offer to perform.

3d. That the answer disclosed that the defendant had abandoned that contract without offering to comply with it.

The part of the answer last mentioned was struck out, but the defendant still claims that he is entitled to lots 5 and 6 under the evidence.

Neither the evidence nor the allegations of the answer justify the defendant's claim under the agreement.

It is true, that the plaintiff did not remove the incumbrances prior to the 15th of August, but the covenants were mutual, and the conveyance of the plaintiff to the defendant and the payment of the \$200, and removing the incumbrances from lots 5 and 6, were to be simultaneously performed. There is no claim that the defendant offered to make the payment. The circumstance that two days after the payment become due, he contracted with Martin, does not tend to show a compliance with that agreement; but it

shows conclusively that he intended, either to assume Martin's position as mortgagee, or to become owner of the legal title to the four lots, without respect to that agreement.

It is clear that the defendant, not having complied or offered to comply with the agreement, can claim nothing under it. And I think this disposes of this branch of the defendant's case.

It is not claimed but that parol evidence may be received to show that a deed, which is in its form absolute, was intended as a mortgage; and the proof is clear that the conveyance of lots 3, 4, 5 and 6 from the plaintiff to Martin was given to secure the payment of money. But it is claimed that the defendant purchased from Martin without notice of the plaintiff's right to redeem. And it is said that the purchase was made with the knowledge and consent of the plaintiff, and with the intention on the part of both parties to vest the absolute title in the defendant, and that the lease was intended as an acknowledgment of such change of ownership.

There are some conflicting statements as to what was communicated by Martin to the defendant, before the defendant paid Martin's demand and obtained the conveyance; but from what the defendant himself testified, it seems to me unquestionable, that he put upon inquiry, concerning the defeasance. He shows that he knew that Martin claimed money, and how much money. That Martin held the land in order to obtain the money that was due to him, and would not sell it without the plaintiff's consent. Although the defendant flatly denies some part of Martin's statements; yet his evidence, as a whole, tends to corroborate Martin.

Martin says, "I told the defendant at that time, the exact amount that Atkinson was owing me, and that upon the payment of that, I would surrender my claim upon the land to anybody Atkinson desired to *give or sell* it to." "He asked me as to the title and I told all I knew about it."

Some stress is laid upon the circumstance that the plaintiff consented to the conveyance from Martin to the defendant; but that argument is deprived of all force,

when it is shown that the defendant knew the facts. With that knowledge he could acquire no higher right than Martin held, and it would have required a deed from the plaintiff, or a foreclosure, to pass the legal title to the defendant.

It is not a necessary inference from the transaction of making the lease, that the parties intended to convert the defendant's equitable claim into a legal title, and the evidence abundantly shows a belief and an intention, at and after that time, on the part of both parties, that the plaintiff had and should have the right to redeem. The effect of the lease was to place the plaintiff in a position that he would be compelled to surrender the possession of the premises to the defendant before he could maintain this suit. He has surrendered possession, and that effect of the lease is at an end.

What it is claimed the lease effected, might have been effected by a deed of quitclaim; the parties were acting under advice of counsel, and undoubtedly would have executed some sufficient instrument, if it had been their intention to destroy the equity of redemption.

A point urged in behalf of the defendant, more strenuously perhaps than any other, is, that the plaintiff has neither tendered the money necessary to redeem, nor brought it into Court.

"In general, the proposition may be laid down that a mortgagor cannot claim redemption without a tender of the debt." (2 Hilliard on Mort. 86.) In *Gordon v. Hobart*, cited by Mr. Hilliard, Judge Story notices a distinction between "cases where a particular and certain debt or duty is *admitted* to be due and unperformed," and "cases where the debt or duty is wholly uncertain and indeterminate, and cannot be ascertained but by the judgment of the court."

The inference is, that in the latter case the jurisdiction may be founded on the necessity of ascertaining the amount of the debt, or the nature and extent of the duty; and that when the right to redeem is wholly denied, a tender is not an indispensable fact to be alleged. There is a manifest reason and necessity for the distinction between cases where the right to redeem is unquestionable, and cases where the prin-

cial object of the suit is to determine a controverted question as to whether an equity of redemption exists. Such a controversy is sufficient to afford grounds of equity jurisdiction; and the court having acquired jurisdiction for one purpose, should retain it for other purposes when necessarily a part of the same subject matter.

The pleadings present a direct issue on the question whether the plaintiff is entitled to redeem on any terms.

And the evidence shows that the defendant, before the commencement of the suit, signified to the plaintiff his intention to hold the premises unconditionally; and not to permit a redemption on any terms. He declared to the plaintiff that no money was due from him, and refused to accept money from the plaintiff; placing his refusal on the ground that the equity of redemption had no existence. This rendered a tender unnecessary. (*Everett v. Saltus*, 15 Wend. 474; *Vanpell v. Woodward*, 2 Sandf. Ch. 143.)

The weight of evidence tends to show that the improvements were made at the plaintiff's charge with his consent; and although the consent may have been reluctantly given, inasmuch as the plaintiff is to have the benefit of them in case he redeems, equity requires that their cost should be added to the amount otherwise due to the defendant. A decree should be entered allowing the plaintiff to redeem upon payment of two thousand two hundred and thirty-five $\frac{43}{100}$ dollars, and the costs of this suit.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1871.

JACOB SHARTLE v. W. I. HUTCHINSON.

SLANDER.—Slandorous words charging an heinous crime, are actionable of themselves.

MAY PLEAD THE TRUTH.—If the words spoken were true, their truth is a plea the defendant has a right to make, and he cannot be blamed for setting it up. But he must take the risk of its truth if he sets it up.

DAMAGES.—If the charge was false, repeating it in the answer is repeating the slander; and is in that case a circumstance proper to be considered by the jury in determining the amount of damages.

THE plaintiff claimed \$10,000 damages in an action for slander.

The words of the defendant, set out in the complaint, imputed to the plaintiff, *peccatum illud inter christianos non nominandum*.

The answer averred as a defense that the words were true; and in mitigation, that they were spoken under circumstances of great aggravation, and at a time when the defendant was greatly excited.

Mitchell & Dolph, for the plaintiff.

Caples & Moreland, for the defendant.

The defendant's counsel requested that the charge be given in writing.

The following instructions presented in behalf of the defendant, the court declined to give: "Should the jury find that the plea of justification has not been sustained by the testimony, the fact that such plea has been set up, cannot be considered by the jury in aggravation of damages."

THE COURT, UPTON, J., instructed as follows:

Gentlemen of the jury:—In an action for slander, where the alleged slander consists of charging the plaintiff with the commission of a heinous crime, if the words were spoken as alleged, and the charge is not true, the words are actionable of themselves. And if they were falsely spoken of the plaintiff by the defendant, the law implies an intent to injure from the words spoken.

In this case the plaintiff admits that he used the words charged in the complaint, and asserts that the charge is true.

If the charge is true, and the plaintiff was guilty of the crime, that is a plea the defendant has a right to make, and he cannot be blamed for setting it up. But he must take the risk if he sets it up, and if it is false and he sees fit to repeat the charge by placing it on the records of the court, that is an aggravation of the wrong that the jury should consider.

I have been requested to instruct you that "should the jury find that such plea of justification has not been sustained by the testimony, the fact that such plea has been set up cannot be considered by the jury in aggravation of damages." I decline to give this instruction; but on the contrary, instruct you that if the charge was false, repeating it in the answer was repeating the slander, and is in that case a circumstance proper to be considered by the jury in determining the amount of damages.

The defendant has a right, even when he declares the charge is true, to give evidence of circumstances in mitigation of damages. If it is true that the defendant was extremely angry and excited when he made the charge in the first instance, that may be a circumstance worthy of your consideration as affecting the question of damages, and if he believed the charge was true, his belief may be considered for the same purpose, should the evidence satisfy you that he did so believe. But if the charge is false, and he knowing it to be false, has come into court and repeated it in his cool moments, the repetition is in such cases a circumstance in aggravation that overrides any excuse that the excitement of the first occasion might have afforded.

If you think from the evidence that the charge was not true, and yet that the defendant had reason to believe the charge to be true, and did so believe when he made the charge, and still so believes, the circumstances may go to the mitigation of damages, but is not a justification.

It may be considered by the jury in fixing upon the amount of damages, but if the imputed crime is not proved, the defendant's belief cannot be treated as evidence to prevent the plaintiff's right to recover.

If the plaintiff is entitled to recover, the amount of damages is a matter to be determined by the jury.

Witnesses are not permitted to appear and give opinions as to the amount, but the jurors are to act upon their own opinions of what is a reasonable amount to be assessed as damages under the facts proved.

The plaintiff had a verdict for \$4,500.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1871.

BEN. HOLLADAY AND C. TEMPLE EMMET, v. S. G.
ELLIOTT *et al.*

DISSOLUTION OF PARTNERSHIP.—ACCOUNTING.—If a partner being without fault, can show that his adversary has violated the term of the partnership contract, and abused the trust with which, as a partner, he was clothed, and that he has partnership assets which he has not accounted for, this entitles such partner to an accounting. In pleading it is only necessary for a party, whether plaintiff or defendant, to state the facts that constitute his cause of action or his defense.

AMENDMENT.—If a proposed amendment to a pleading sets up only a cause of action or of defense that existed at the filing of the former pleading, it devolves upon the party asking the amendment to show a reasonable excuse for the delay.

IDEM.—SUPPLEMENTARY ANSWER.—There is a clear distinction between a supplementary answer and an amendment that sets up a defense which was in existence at the time of the original answer.

DUTY OF COUNSEL.—Where counsel had appeared and subscribed the original answer, and the excuse was made that the defendant had no means to secure the aid of counsel: *It was held*, that the law will not tolerate the position that counsel can or will place themselves on the record as such, and afterwards permit this excuse to be true in point of fact.

THIS is a suit for the dissolution of partnership, and the answer filed consists of denials of the allegations of the complainants.

The defendant, S. G. Elliott, moves the circuit judge at chambers, for an order granting leave to file an amendment answer in the nature of a cross-bill, the cause being before a referee for hearing.

Mitchell & Dolph, for the plaintiff in opposition to the motion, make the following points of objection:

1st. The judge at chambers is not authorized to hear the motion.

2d. The case is referred and an amendment cannot be regularly ordered unless the case is ordered into court.

3d. The statute does not authorize such an amendment after the trial has commenced.

4th. All material matters now proposed to be set up were known to the defendant when the answer was filed, or at

least, before the case was referred, and the motion comes too late.

5th. The same matters are already set up in other suits pending between the same parties; namely, in one suit in this court, in one suit in the United States circuit court for the district of Oregon, and in one suit in the fifteenth district court of the state of California.

Messrs. Patterson & Felton and *Judge Shattuck*, for the defendant, claim that the circumstances justify the application and excuse the delay. The principal grounds being,

1st. The leading facts upon which the right to affirmative relief is based, came to the knowledge of the defendant recently.

2d. The defendant was absent from the state when the answer was filed.

3d. The defendant was, until recently, laboring under too great a financial embarrassment to be able to secure the services of counsel.

The motion being argued and submitted upon the defendant's affidavit, and the facts that appear in the pleadings, was taken under advisement, and the following opinion was filed.

URRON, J. The cause is submitted on the defendant's motion for leave to file an amended answer in the nature of a cross-bill, for the purpose of bringing before the court for investigation diverse transactions and contracts between the plaintiff and other persons and corporations not heretofore made parties to this suit, which transactions are alleged to be in fraud of the defendant, and for the purpose of setting aside certain of those contracts, and of compelling the plaintiff to account.

In order to arrive at a clear understanding of the facts upon which counsel rest their arguments, I have attempted to arrange the more prominent transactions out of which the controversy has arisen, in order of their respective dates.

It appears from the pleadings that the plaintiff, Emmet, and the defendant, Elliott, were acquaintances, or at least had business relations, as early as 1866. On the third of

September of that year, they joined with others in a written proposition to certain citizens of Oregon, in regard to securing stock in a railroad corporation to be organized in this State.

On the twentieth of March, 1867, Albert J. Cook made Mr. Elliott his attorney in fact.

On the twenty-second of April, 1867, The Oregon Central Railroad Co. was incorporated, and on the same day that corporation contracted with A. J. Cook for the construction, by him, of 150 miles of railroad.

On the second of May, 1867, A. J. Cook made a written assignment of this contract to the defendant, Elliott.

On the twelfth of May, 1867, The Oregon Central Railroad Co. contracted with a firm called A. J. Cook & Co., that the firm would construct 210 miles of railroad. In each case it was provided that the contractor should receive, as compensation, certain bonds to be secured by mortgage on the proposed railroad; and in the second contract it was provided that the contractor should also receive certain stock of The Oregon Central Railroad Co. Some of the bonds were delivered by The Oregon Central Railroad Co., to A. J. Cook & Co. On the twelfth of September, 1868, the plaintiffs and the defendant, Elliott, formed a partnership under the firm name of Ben. Holladay & Co., for the purpose of equipping and operating one or more railroads in the state of Oregon, and the states and territories adjacent thereto. This firm, at its formation, succeeded to the contracts and the assets of A. J. Cook & Co., and entered upon the work of building the line of railroad, the defendant, Elliott, being superintendent of construction by the terms of the contract of partnership. On the seventeenth of October, 1868, the legislature of Oregon, designated The Oregon Central Railroad Co. as the company entitled to certain lands granted by congress. On the fourth of October, 1869, the plaintiff, Holladay, employed a new superintendent, and gave Mr. Elliott notice that he, Elliott, was discharged—Mr. Holladay claiming in this suit that Mr. Elliott had been guilty of fraud in procuring the formation of the partnership firm of Ben. Holladay & Co.; that he was in-

competent to superintend the work, and that he had been guilty of breach of the contract of partnership; Mr. Holladay, claiming to act in conjunction with Mr. Emmet, assumed control of the work of constructing the railroad. On the tenth of October, 1869, Mr. Holladay published a notice in the name of Ben. Holladay & Co., that Mr. Elliott was not authorized to make contracts on behalf of Ben. Holladay & Co.

About this time, Mr. Elliott commenced a proceeding in this court against the plaintiffs, which was dismissed on his motion, on December 20, 1869.

On November 4th, 1869, the plaintiffs commenced this suit, and the amended complaint was filed on the following day.

About this time Mr. Elliott left the state of Oregon, not being served with process, but knowing of the pendency of this suit; and on Nov. 23, 1869, publication of the summons was made.

About this time Mr. Holladay, using his own notes, or those of himself and friends, or those of Ben. Holladay & Co., borrowed about \$800,000 to \$1,000,000, pledging the bonds of the Oregon Central Railroad Co., which had been obtained of A. J. Cook & Co., as collateral security, out of which loan he applied enough to his own private account to satisfy all the advances he had made in the business of Ben. Holladay & Co.

December 20th, 1869, Mr. Elliott, on his own motion, dismissed his proceedings in this court against Holladay and Emmet.

On February 14th, 1870, the plaintiffs filed in this cause proof of service of summons, by publication, on the defendant Elliott.

On March 14th, 1870, the defendant Elliott filed his answer in this cause.

On March 16th, 1870, a corporation was formed under the name of the Oregon and California R. R. Co.

On March 26th, 1870, the Directors of the Oregon and California Railroad Company passed a resolution proposing to purchase from the Oregon Central R. R. Co., all its

property; and Mr. Holladay, as president of the first named company, communicated the proposition to the latter company.

On March 29th, 1870, the Oregon Central R. R. Co. made and delivered a writing, under seal of the corporation, purporting to convey all its property to the Oregon and California R. R. Co.

On April 11th, 1870, the replication was filed in this cause.

On April 15th, 1870, the Oregon and California R. R. Co. mortgaged its road to trustees, to secure its bonds to the amount of \$30,000 per mile. And at the same time executed as further security a deed of trust conveying its lands to the same trustees.

About this time, or before, the defendant Holladay made arrangements to take up the obligations given for the \$800,000 or \$1,000,000, before mentioned, and to withdraw the bonds of the Oregon Central R. R. Co.; and he surrendered the said bonds to that company to be cancelled, or otherwise disposed of. And about this time the Oregon and California R. R. Co., Holladay being president and owning a majority of its stock, sold \$3,750,000 of its bonds at 60 cents on the dollar, obtained a portion of the proceeds, and made arrangements to receive more from time to time.

On June 24th, 1870, Mr. Elliott commenced a suit in this court against these plaintiffs charging them with confederating together, in violation of the partnership articles of the firm of Ben. Holladay & Co., for the purpose of rendering valueless his interest in said firm, estimating his interest at \$7,000,000. And charging them with having for that purpose deposed him from his position as superintendent, assumed the control of the affairs and assets of Ben. Holladay & Co., cancelled the contract for construction, and conspired to dissolve the old company and to form a new one; with having transferred the interest of the said Elliott to the new company, and with threatening to sell the bonds of the new company.

July 5th, 1870, a motion was made in the last named cause to make the complaint more specific.

On November 23d, 1870, the parties stipulated in this cause that each should have a six months' time to take evidence.

In December, 1870, Mr. Elliott commenced a suit in the fifteenth district court of the state of California in relation to the same subject matter, and including these plaintiffs as defendants, which suit is pending.

In December, 1870, the cause was by consent referred for trial of all the issues.

In May, 1871, a suit was commenced by Mr. Elliott in the United States circuit court for the district of Oregon, making the Oregon Central R. R. Co. and the Oregon and California R. R. Co. defendants.

Several matters touching the proceedings in this cause, and occurring since the seventeenth of May, 1871, have been alluded to.

The six months in which to take testimony alluded to in the stipulation, expired on the twenty-third of May, 1871, but by consent, or by order of the referee, the time has been prolonged, and the taking of testimony is not fully at an end.

The plaintiffs had introduced their evidence and rested, before this motion was made.

The defendant and two of his counsel were at San Francisco, expecting to leave by the steamer advertised to leave on the seventeenth day of May, but they were unexpectedly delayed, and did not arrive here until the plaintiffs had closed their testimony.

The affidavits and exhibits filed upon the hearing of the motion, show in detail the mode in which the transactions above referred to were effected.

With the understanding of the facts, I have considered the reasons presented for and against the motion to amend.

The question whether this motion can be heard at chambers becomes unimportant, since the term has commenced and the court is now in session.

The point that the referee should first be required to report the case to the court, is a question of practice that I do not find decided upon authority, and I pass it upon

similar grounds. If the motion depends upon either or both of those grounds, upon its being overruled the application can be immediately made in form.

Passing for the present, also, the question whether the application is within the letter of ss. 94 to 104 of the Code, I propose to consider first to what extent the amendment presents matter occurring since the former answer, and what material facts are presented that have come to the knowledge of the defendant since he commenced his suit on the twenty-fourth of June last. One of the objects sought in this suit, as disclosed by the complaint, and as proposed by the amendment, is an accounting. Of course the gist of the controversy is the determination of the issues in regard to breach of the contract of partnership; but an accounting, although secondary, is one of the objects. It is therefore necessary to consider what will entitle a party to an accounting?

If either of the partners, being without fault, can show that his adversary has violated the terms of the partnership contract, and abused the trust with which as a partner he was clothed, and that he has partnership assets that he has not accounted for, that showing entitles such partner to an accounting.

It is only necessary for a party, either plaintiff or defendant, to state the facts that constitute his cause of action or defense. (*McDonald v. Bear River & A. W. & M. Co.*, 15 Cal. 145; *Green v. Palmer*, 15 Id. 411.) He is not required to state the evidence that proves those facts, nor is it necessary, to entitle him to an accounting and to the benefits of the accounting, that he should set out a detailed history of his adversary's dealings.

Whether we are examining the facts actually occurring since the last answer, or considering those that are newly discovered, we are confined to such as it is necessary to plead.

Those that are in this sense new, as distinguished from newly discovered, are such as occurred after March 14, 1870.

There is a clear distinction between a proposition to file a supplementary answer, to enable party to obtain a

more full and adequate remedy, or to set up as a distinct defense some new and distinct occurrence that of itself amounts to a defense or cause of suit, and a proposition to set up a defense or cause of suit that was in existence at the time of the former answer. This distinction is important, and should not be overlooked if we would arrive at correct conclusions.

Section 105 of the Code provides for cases of the former class, and the sections from 94 to 104 apply to the latter. These provisions of the Code, so far as they are applicable to this motion, are declaratory of the law as it existed before the Code was enacted, and I think the same rules would be in force if the subject had not been mentioned in the Code. Facts of the former class, when material and necessary to the proper determination of the case already made by the pleadings, are admissible when presented properly, from the bare circumstance of the facts having transpired since the party had an opportunity to plead. But defenses or causes of suit of the latter class the court has no right to admit, unless the neglect or delay is shown to be excusable.

The real question to be determined, is whether the defendant ought to be allowed, now, to file an answer setting up affirmative allegations in the nature of a cross-bill. Under the facts presented upon this motion I have no hesitation in drawing a line of distinction between those facts that had come to the defendant's knowledge at the time he filed his complaint, June 24, 1870, and those that have been disclosed in the course of taking depositions during the last month.

If this amendment is a proposition to set up a defense or cause of suit that was in existence at the time of the former answer, it of course devolves on the defendant to show a reasonable excuse for the delay. And I think there is no doubt but that if it was in existence, and known to the defendant, as early as June 24, 1870, the intervening time and the action since taken in the case places him in the same attitude.

If the distinction first mentioned is sound, those subsequent transactions, the proof of which would only tend to

give a more adequate remedy, but which are not necessary to constitute the defendant's cause of suit, ought not to determine the question whether the delay in setting up the main subject-matter of the cross-suit is excusable.

By those facts set forth in the proposed amendment that cannot be weighed in determining whether the delay is excusable, I allude to the details of the mode of forming the new railroad company and attempting to dissolve or abolish the old one; and the various transfers of stocks, bonds and lands, that have been made, together with the dealings of the plaintiff with third parties that have transpired since surrendering the construction contracts.

I suppose all that can be claimed from these facts, is that proof of them will afford more full and perfect means of relief, if it results that the defendant is entitled to relief. But the defendant's case—that is, the question whether he is entitled to relief, rests entirely on facts existing prior to those transactions.

For the purpose of determining whether the delay is excusable, the facts are to be considered as they were developed to the defendant when, on June 24, he resolved to claim affirmative relief in an original suit, in place of setting up the same facts in this suit.

The matters alleged as grounds for this motion, may be reduced to three classes:

The defendant's want of knowledge of some of the important facts,

His absence from the State and the secrecy and artifice of the plaintiffs,

And his want of means and consequent inability to secure the aid of counsel.

There are very many matters mentioned in the exhibits, and unknown to Mr. Elliot until recently, which are claimed in argument as being facts necessary to the defendant's claim of affirmative relief. Many of them are matters of detail not necessary to be mentioned in the pleadings, although material as evidence. Others go to show what kind or extent of relief should be had, if the defense is maintained. But of some, it is claimed, a knowledge was

indispensable. Prominent among these, is the circumstance that about the time of the commencement of this suit, or perhaps before, Mr. Holladay, or the firm of Ben. Holladay & Co., obtained \$800,000 or \$1,000,000 by means of railroad bonds in the hands of the firm, out of which Holladay was reimbursed for all the advances he had made to Ben. Holladay & Co.

If I correctly understand the position taken, it is that if Mr. Elliott had known that fact, he would have had reason to know or believe that his interests in the firm of Ben. Holladay & Co. were greatly enhanced in value, and to believe that, upon an accounting, there would have been a large balance in his favor, and that that knowledge would have been a reason for applying for affirmative relief which he would then have acted upon. The force of this discovery, as an excuse for not setting up an affirmative defense, must rest on the assumption that Mr. Elliott, for want of this knowledge, was induced to believe that his interest in the firm of Ben. Holladay & Co. was of little value; and induced for a time to abandon the idea of seeking to retain it, or of seeking to obtain affirmative relief. His right to an accounting, and to his distributive share of the assets, or his right to be reinstated, did not depend on the questions whether the firm owed Mr. Holladay or whether he was indebted to the firm. And I cannot see that a want of this knowledge was a reason for not setting up a claim for affirmative relief by cross-bill, unless the defendant was made to believe his interest was not of sufficient value to warrant that course. But counsel have not taken the position, and do not suggest that he has ever thought of such abandonment of the assets, and of course Mr. Elliott could not claim that he was misled or deceived so as to be of such opinion for any considerable time, for, in his complaint of June 24th, he places a very considerable estimate on his interest in the firm, and states his damages at \$2,000,000.

It is not necessary to go into the subject whether the assets of Ben. Holladay & Co. are to be considered greatly increased by the firm having obtained cash to be expended in their enterprise, through a pledge of bonds held by them,

together with the note of one of the firm or of the whole firm, inasmuch as the right to an accounting does not depend on the question whether the amount of assets is great or small or upon whether they have increased or diminished. And as to the propriety of the act of obtaining the money, if it was fairly obtained for the business of the firm including reimbursing individual members for advances made by them, it would be a fruitless attempt at self-deception for the court or the parties to ignore the fact that in all such cases the bonds are made by the corporation and obtained by contractors expressly for the purpose of raising money by pledging or by selling the bonds. It cannot be doubted Mr. Elliott contemplated some transaction similar to that which was effected by Mr. Holladay, if the members of the firm had continued to co-operate; and he probably would have approved of this if no dispute had occurred between the members of the firm. This is not a matter like that of breaking up the partnership, that goes to the gist of the case.

It may be a very important fact on the question of the kind or amount of relief to which the defendant may be found entitled, but at the most it is a mere transfer of one kind of assets into another kind, and I cannot think ignorance of it goes far as an excuse for the delay in offering the proposed cross-bill.

An inspection of the complaint filed by Mr. Elliott will disclose that Mr. Elliott had such knowledge as enabled his counsel to draft a sufficient pleading to admit this fact in evidence, without its being necessary he should know of this particular transaction.

Many of these facts, relied on as newly discovered, are of a class which are treated in practice as but evidence not required to be set forth in the pleadings. I cannot recall one of the circumstances occurring prior to the filing of Mr. Elliott's complaint in June last, but could be introduced in evidence under the allegations of that complaint. Or if the same allegations of fact had been set forth as an answer in this case, I think there are none of the pertinent facts set up in the exhibits, as occurring prior to that time that

would be admissible under the proposed amended answer, and not admissible under the allegations of the complaint filed by Mr. Elliott in June, 1870.

Whether we take the literal reading of the code, or pursue the practice that formerly prevailed in courts of chancery, the rule is that: "A general statement of the matter of fact is sufficient, and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge, for these circumstances are matters of evidence, which need not be charged in order to let them in as proofs." (Story Eq. Pl. s. 28.)

In that complaint the defendant set up the attempt to form a new railroad company and to dissolve the old one, the cancelling of the construction contracts, and the issuing of bonds by the new company and threatening to sell them. He thus laid the foundation for evidence of all the transactions of the parties that are pertinent up to the sale of the bonds of the Oregon and California Railroad Company. If the same allegations contained in Mr. Elliott's complaint had been set forth in the answer, the proposition to add a supplemental answer would have been very different from that which is now made.

The absence of Mr. Elliott can hardly be urged; he was here and verified his complaint in June, 1870; and what he has urged as unfair dealing, has all transpired within a month past, and it is not necessary for me to refer further to the controverted statements of the parties on that matter.

A third ground of excuse is, that the defendant's means had become exhausted, so that he was unable to meet the expenses of the litigation, and that this embarrassment has been caused in whole or in part by the conduct of the plaintiff.

As to the other expenses, aside from that of employing counsel, there are circumstances tending to support the defendant's position, which would certainly be deserving of great consideration if the necessity of meeting such other expenses had caused the delay, but that is not claimed.

So far as relates to the defendant's inability to employ

counsel, the record of the court and the theory of the law are conclusively against this excuse. The records of the court show that the defendant had the fortune to secure the services of counsel in time for all the purposes of the case, and the court cannot but know that they are men able and skilled in their profession. And the law will not tolerate the position that counsel can or will place themselves on the record as such, and afterwards permit the excuse here urged to be true in point of fact.

If this motion had been made before the case was referred, or even before the parties commenced taking evidence, the proposition would present less difficulty.

It was said in argument that the defendant's request was merely asking to be heard, and the subject was treated, to some extent, as if denying this motion was equivalent to turning the defendant out of court without a hearing. But this is not the case. If the defendant is entitled to affirmative relief, he can still proceed to obtain it. I have reason to suppose that in the earlier proceedings in this case, it was the opinion of counsel that an original suit was the safer or better course for the defendant. And I certainly am no way confident but that it is more economical and better for all parties to first try the issues and determine the questions that form the gist of the controversy, that is, the right and the wrong of the attempt to dissolve the firm of Ben. Holladay & Co., before going into the extensive investigations suggested in the proposed amendment.

I have not thought it necessary to investigate the questions raised as to the pendency of other suits, and the bearing that they should have on this application.

Granting this motion would necessarily cause more or less delay, would probably necessitate a re-examination of witnesses to some extent, and would put it in the power of either party to cause as much delay as would result ordinarily from granting a continuance. If we compare the defendant's showing on the subject of diligence, or of excusing the want of it, with that which is required to procure a continuance, I think it lacks much of bearing that test.

I do not think the facts justify granting the motion.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1871.

MARY HARTY v. W. S. LADD.

ACKNOWLEDGMENT OF DEED BY A MARRIED WOMAN—PAROL.—Where the certificate of the acknowledgment of a deed by a *femme covert*, does not show that she was examined separate and apart from her husband, parol evidence is not admissible to show that she was in fact so examined.

THIS action is for the recovery of an undivided third of a parcel of land, that had been conveyed by Dennis Harty, the plaintiff's deceased husband, in his lifetime, to the defendant's grantor.

The answer denies knowledge or information sufficient to form a belief as to the several allegations of the complaint, and sets up as separate defenses:

1st. That the defendant is owner in fee of the premises.

2d. That on the sixth day of May, 1867, the said plaintiff and the said Dennis Harty, then pretending to be husband and wife, under their hands and seals, executed and delivered to Stephen Coffin, a deed of the premises, and duly acknowledged the same. That "the said plaintiff then and there, on an examination separate and apart from her said supposed or pretended husband, acknowledged that she executed the said deed voluntarily, and without fear or compulsion from any one, before the said William Beck, justice of the peace." That "by accident and mistake, the said William Beck, justice of the peace as aforesaid, in his certificate of the acknowledgment of the said deed, omitted to state in said certificate that the plaintiff was examined separate and apart from her said husband, and that upon such examinations she acknowledged that she executed the said deed voluntarily, and without fear or compulsion from any one. But defendant in fact says that such examination of said plaintiff was made separate and apart from her husband, and the plaintiff did" then and there, before said justice of the peace, so acknowledge.

3d. That the said Dennis Harty's purchase of said premises, was an exchange of lands. That he gave in exchange for this and other property, "the one half of the donation

land claim of the said Harty and his wife, the plaintiff, being said Dennis' half of said land claim, which land claim was situated in _____ county, in the state of Oregon." And that the said premises was re-exchanged and reconveyed by the said Dennis Harty, to the said Coffin, said defendant's grantor, for the said half of the said donation land claim. And that the said Dennis Harty departed this life more than one year prior to the time of the commencement of this action, and the plaintiff has commenced no previous proceeding to recover her dower in the premises.

The plaintiff demurs to each of the two defenses last mentioned, as not stating sufficient facts.

Shattuck & Killin, for the plaintiff.

Logan & Waldo, for the defendant.

BY THE COURT, UPTON, J. The power of a married woman to divest herself of her interest in land by joining in the execution of a deed, is a power derived from the statute. By the common law she had not the capacity to thus divest herself of her interest, and the statute concerning conveyances has not wholly removed the disability of a married woman to convey real estate by deed, but has qualified it, or created an exception to the rule by providing a special mode by which a wife may divest herself of her interest in lands. The affirmative provisions are in substance that lands may be conveyed by deed, signed, sealed "and *acknowledged* or proved *and recorded*, as directed in this title."

"A husband and wife may by their joint deed convey the real estate of the wife."

"The acknowledgment of the wife shall be taken separately and apart from her husband."

"The officer taking the acknowledgment shall endorse thereon a certificate of the acknowledgment thereof."

The deed shall be recorded "*with the certificate of acknowledgment.*"

For the reason that the deed of a married woman has no force or effect, except that which is derived from these provisions of statute, it follows that the deed must be made in

compliance with the statute. The statute can no more be deemed complied with, without the proper certificate being endorsed on the deed, than without the acknowledgment or without the signature of the wife.

A *femme covert* derives her power to convey by deed from the statute, and a full compliance includes the specified acts on the part of the certifying officer. The statute contemplates that the specified certificate will be made, and sections 1 and 22 of the act concerning conveyances indicate that the recording of the deed, "with the certificate of acknowledgment," is essential to constitute a conveyance by a married woman. I think that the very language of the statute which confers on a wife power to convey, excludes the idea of proving her acknowledgment or her execution of the deed in a case where the certificate has never existed. *

The objection to the defense last set out in the answer, is that the answer is uncertain as to the tract of land alleged to have been exchanged. If it was necessary to designate the tract, it should be described with certainty.

The demurrer should be sustained as to each of the two defenses last set forth in the answer.

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CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1871.

MARY CLINE v. JACOB CLINE.

PRACTICE.—MOTION TO STRIKE OUT.—When a pleading is filed in good faith the question, whether it contains facts constituting a cause of suit, should be tried on demurrer and not on a motion to strike out.

PLEADING.—MATERIAL AVERMENTS.—The law intends that the pleader should state only material facts. Whether an allegation is material may be determined by this question: "If it be denied will the failure to prove it decide the case, in whole or in part?" If it will not, the fact alleged is not material.

THIS cause was submitted on the defendant's motion to strike out parts of the complaint. The facts are stated in the opinion.

* *Elliott v. Piersol*, 1 Pet. 328; *Brown v. Farran*, 3 Ohio, 155; 3 McLean, 230.

Bronaugh & Catlin and R. E. Bybee, for the plaintiff.

Mitchell & Dolph, for the defendant.

UPTON, J. The defendant moves to strike out several designated parts of the complaint, and as to each part, puts the motion on the ground that the part is irrelevant, immaterial, sham, and the statement of evidence. The motion, as a whole, embraces every part of the complaint, and much of the argument has been addressed to the question whether the complaint states facts sufficient to constitute a cause of action.

I do not deem that question properly raised by this motion. If a complaint is filed in good faith and presents issuable facts, and the defendant desires to raise the question whether the facts stated constitute a cause of action, he should present that question by demurrer, that when the decision is made, a judgment may be rendered, unless leave is obtained to amend or plead over. I shall, therefore, not undertake to pass upon that question on this motion.

The principal questions raised by this motion is whether certain parts of the complaint contain statements of fact as contradistinguished from evidence, and whether certain allegations are redundant.

The complaint sets out the substance of a decree of divorce, obtained by the plaintiff against the defendant in the circuit court of this state in 1862; and says it was therein decreed, "That all the estate, right, title and interest of the said Jacob Cline in said lots 3, 4, 5 and 6, in block 111 in the city of Portland, be, and the same is, divested out of the said Jacob Cline, defendant, and the same is hereby vested in the four minor children of the parties," that is, four minor children of this plaintiff and this defendant, fruit of the marriage dissolved by said decree. The complaint further states that this plaintiff was by said decree made guardian of said four minor children and decreed the possession of the said lots. And that while the plaintiff was so in possession of said lots a street tax of \$551.75 was assessed upon, and become a lien on said lots, and this plaintiff to

save and protect said lots from sale on said lien, paid the said street tax. The complaint charges that afterwards this defendant sold his interest in said lots to one Fitch, who commenced an action of ejectment in the United States circuit court for the district of Oregon, against said minor children, in which action it was adjudged that said minors were entitled to said lots only during their minority. And said Fitch, as grantee of this defendant, recovered a judgment therein, to the effect that he was owner of said lots in fee, as against three of the said children of these parties, (the said three children having reached their majority,) and as against the fourth, he was adjudged to be entitled to the reversion, and to be entitled to have exclusive possession, at the said minor's majority. This complaint shows also that in the divorce suit \$1,500 was decreed as alimony to this plaintiff; and that the said tax was so paid by this plaintiff out of the money so decreed to her as alimony, and while said lots were so in her possession as guardian; that said payment was in order to release said lots from the lien of said street tax, and to prevent them from being sold therefor, and that the payment was made for the benefit of said children, they then being minors.

The first question discussed, is, whether setting forth the decree of the state court and the judgment of the United States court, is a concise statement of facts that constitute a cause of suit. If the plaintiff is suing to recover a title which is predeceated upon a judgment in her favor, and the judgment is binding on the defendant as a party, or because of privity, the rendition of the judgment is a material fact. But if the rights and liabilities of the parties arise from other sources, and are not based upon or determined by the judgment, the rendition or existence of the judgment is not one of the facts constituting the cause of suit. One of these adjudications purports to vest the fee of this property in the minor children of these parties, and the other adjudges it to be in a third party, who may be treated as a stranger so far as this proceeding is concerned. And I think it may be assumed that these allegations of the complaint are designed either to show the present condition of the title, or to show

that the plaintiff does not know which of the two adjudications correctly represent its condition; or the plaintiff must design to show that by the first decision she was led into an error, and that she had good reason to believe, and did believe, at the time she advanced the money, that the title stood as set forth in the decree of the state court. But the complaint fails to aver what is the present state of the title, or that she does not know its condition, or that she has been misled or deceived in regard to it.

The defendant claims that one or more of the propositions just mentioned as omitted from the complaint, should be averred; and that propositions of that character are the facts essential to be plead, and the only ones he is bound to traverse or to admit. In other words, that such are the facts which the code requires should be concisely stated in a pleading.

The plaintiff claims that a narration of the circumstances under which the plaintiff proceeded is essential to a proper understanding of the case.

In determining whether any part of this motion should be granted—and if any part how much—it is necessary to construe the provision of the code which requires “a plain and concise statement of the facts;” or if that language is deemed so clear as not to be of doubtful import, to examine the complaint to see whether it is a concise statement of the facts constituting a cause of action or suit. The law intends that the pleader shall state only material facts.

The distinction between facts, upon which a judgment may be predicated, and evidence, by which the material facts may be established, is so clearly drawn in the text books and in reported cases, that it does not seem necessary to repeat a statement of the grounds upon which that distinction rests. If it were not for the importance of maintaining system and uniformity in our modes of practice, it might not repay the labor either of the court or of counsel to examine and consider such questions as are raised by this motion.

Yet these questions are found to be of practical importance in many ways. If one is permitted to set out his evi-

dence, under a system of practice that does not contemplate that course, he obtains an unfair advantage over his adversary by compelling him to admit or to deny every assertion that the pleader chooses to make. If for want of time to attend to details and minor points of pleading and practice, or for any other reason, the practice is permitted, and one party to an action or suit, pursues that course, the tendency is to induce, if it does not compel, the other party to resort to a similar mode; and if the practice is sustained, instead of a concise statement of facts, pleadings may become a loose discursive and indefinite mass of evidence, inferences and argument, making the records of the court very uninviting sources of information, and rendering the trial of a cause laborious, and its results extremely uncertain. From these considerations, it becomes a duty of the court to give to this class of motions, whatever attention is necessary to prevent the evil above suggested.

I know of no more lucid exposition of the distinction between pleading the facts that constitute the cause of action or of suit, and presenting a statement of the evidence upon which the party relies, than that set forth in a manual written by one of the commissioners engaged in framing the New York code. It is substantially republished in the case of *Green v. Palmer*, 15 Cal. 411. It is there said, "The following question will determine in every case, whether an allegation is material. 'If it be denied, will the failure to prove it, decide the case in whole or in part?' If it will not, then the fact alleged is not material; it is not one of those which constitute the cause of action, defense, or reply."

If we apply this test to what is said of the decree of the state court, and of the judgment of the United States circuit court, touching the title to the lots of land, we shall ascertain whether those allegations are facts constituting the cause of suit.

If the defendant should deny that any judgment was rendered in the United States circuit court, and on the trial the plaintiff should totally fail to prove the judgment; but if it should be shown that the title to the property is in fact

as the plaintiff says it was there adjudged to be; it is obvious that the plaintiff's case would suffer nothing by her failure to prove the rendition of that judgment.

It is in this respect, parallel to a case, where it should be plead that the defendant *admitted* that he made a particular contract. If the execution of the contract is proved, it becomes immaterial whether the defendant admitted the execution or not.

In this case it is immaterial, that is, it is not an essential ultimate fact in the case, whether the United States circuit court rendered that judgment or not. The material question in that particular, is whether Mr. Fitch owns the land, or the certain estate in it, and not whether it has been so adjudged.

If the plaintiff believes her wards to have been owners of the lots, as was declared in the decree of divorce, and deems that a material fact, the complaint should state that her wards were owners in fee; but if her wards were only entitled to the possession during their minority, and the quantity and duration of their interest is material, the duration of their estate should be set out, and not a judgment which has been rendered on that subject between other parties.

It was said in argument, that it is better to set out in narrative form, what has transpired between the parties, that the whole matter may be before the court.

The proposition amounts to this: that in a case of this kind, it is not sufficient to state the facts that constitute the cause of suit, but the plaintiff should be permitted to set out the circumstances, with such detail and particularity, that it shall become evident that the allegations of fact contained in the complaint are true, and that it may be obvious from the pleadings, what fortuitous circumstances caused the material facts to be as they are. Whatever may be the conveniences of such a system, I am confident the inconveniences would greatly preponderate. And it is certain it will require legislation to make it admissible.

If the plaintiff has been misled about the title, and bases her claim in whole or in part, on that ground, she should not leave it to be inferred from the evidence which she sets

out that she has been misled; she should omit the evidence and state the facts, that show that the defendant ought to refund the money.

I am unable to see how it is material, out of what fund of hers the plaintiff advanced the money.

As to those parts of the complaint which recites what was adjudged in regard to the title; and as to the allegation in regard to the alimony decreed, the motion should be granted.

CIRCUIT COURT FOR CLACKAMAS COUNTY, OCTOBER TERM, 1871.

W. W. HARPER BY NORTON (*Guardian of W. W. Harper,*)
v. A. M. HARDING *et al.*

SETTING ASIDE A DECREE.—JURISDICTION.—As a general rule, a decree of a court having jurisdiction cannot be attacked collaterally, and it is not a sufficient showing of a want of jurisdiction to allege that the defendant was insane at the time of the trial.

BILL OF REVIEW.—To warrant a review of a decree by an original suit, except for error appearing on the record, a reason must be shown why the facts now presented were not presented and determined on the former trial.

THE plaintiff, W. W. Harper, who it is averred is insane, sues by guardian, to set aside certain deeds and to recover possession of the premises in controversy.

. The plaintiff charges that on June 2, 1860, said Harper executed a mortgage while said Harper was insane; that while said Harper was still insane, the said mortgage was foreclosed, and the premises sold to the mortgagee, A. M. Harding, in April, 1864, who afterwards conveyed to the defendants, King and Hawley. He also charges that the mortgage was without consideration.

The complaint then proceeds as follows: "For further and separate cause of suit, the plaintiff avers that on the eighth day of August, 1864, the said King and Hawley fraudulently and without consideration, obtained a deed for the above described premises from W. W. Harper. That

the said Harper was insane at the time of the execution of the deed. That said defendants now hold said premises adversely to the plaintiff under said deeds."

The defendants demurred, on the ground that two causes of suit are improperly united, and are not separately stated, and that the complaint does not state facts sufficient to constitute a cause of suit.

During the argument, the words "for further and separate cause of suit" were stricken out by consent.

H. F. Forbs, for the plaintiff.

Johnson & McCown, for the defendants.

BY THE COURT. (UPTON, J.) I think the complaint is insufficient. In order to maintain this suit the plaintiff must show that the defendants are not entitled to the premises, either under the foreclosure or under the deed executed subsequently.

If the allegation is true, that Mr. Harper was insane when he executed the mortgage, that is a fact that might have been plead and proved in the foreclosure suit. As a general rule a judgment or decree of a court having jurisdiction cannot be attacked collaterally; and when a decree is attacked for want of jurisdiction, it is not a sufficient showing of such lack, to declare that the defendant was insane at the time. It does not appear by this complaint but that Harper was duly served and appeared by guardian. Nor is any reason shown why his alleged insanity was not plead in that suit. In fact there is nothing set forth in this complaint to show that the same allegations that are made in this complaint were not set up and passed upon in the foreclosure suit. For aught that appears, the court in which the mortgage was foreclosed, may have heard and determined the matters which the plaintiff now seeks to present, and it does appear that the court then pronounced a decree upon the subject matter involved in this suit; that is, the due execution of the mortgage. A plea of insanity may have been negatived; or the present plaintiff may have been represented by guardian and may have failed to set up the in-

sanity. The presumption being in favor of the judgments and decrees of a court of record, in the absence of any allegations on the subject, it will be presumed that the court having jurisdiction of the subject and of the person, proceeded regularly and decided correctly. The decree of foreclosure cannot be attacked collaterally, and the facts stated are not sufficient to authorize a review of the decree of foreclosure.

The demurrer should be sustained.

CIRCUIT COURT FOR WASHINGTON COUNTY, OCTOBER TERM, 1871.

DARLING SMITH v. LYDIA SMITH.

COUNTER AFFIDAVITS.—On a motion to open a decree under sec. 57 of the code, counter affidavits may be filed.

CONSTRUCTION.—Where a literal construction of the words of an act leads to an absurdity, resort will be had to the ordinary means of interpretation, and the court will look to the occasion and necessity of the law, the defects in the former law, and the designed remedy.

IDEM.—The times of holding the circuit courts in the third, fourth and fifth districts, are not changed by the act of 1870.

SERVICE BY PUBLICATION.—**MOTION TO OPEN A DECREE.**—The circumstances that an affidavit to obtain an order of publication of summons, was made upon information only, and that it did not show what effort had been made to learn the defendant's residence, may be considered on a motion, for leave to answer after default and decree.

DIVORCE.—**HUSBAND TO ADVANCE MONEY.**—Where a decree of divorce, obtained without personal service of summons was opened, and the wife allowed to defend, and there were circumstances tending to show that the plaintiff had induced or permitted his wife to go to another state that he might obtain a divorce in her absence without her knowledge; it was directed that an order be entered requiring the plaintiff to provide for the expenses of her return; but it was required that the order should contain provisions guarding against diverting the money to any other purpose.

THIS is an application to open a decree of divorce, and to allow the defendant to answer, made under section 57 of the code. This section provides that a defendant, against whom publication is ordered, may for cause be allowed to defend

at any time before judgment, and may, "upon good cause shown, and upon such terms as may be proper, be allowed to defend after judgment, and within one year after the entry of such judgment, on such terms as may be just."

The defendant filed, with her motion, the affidavit of her attorney; and the plaintiff filed counter affidavits. The defendant moved to strike out the counter affidavits.

The motion to strike out was overruled, and the court permitted the counter affidavits to be read.

The plaintiff's attorneys also presented this objection to this proceeding, that the amendment, found on page 4, of the acts of 1870, repeals the act of 1868, providing the times for holding the supreme and circuit courts, and does not provide any time for the holding of this court; and that no term can now be legally held except terms fixed by order of the court or of a judge thereof. This objection and the motion to open the decree, were both submitted at the same time.

W. D. Hare and O. Humason, for the plaintiff.

Ball & Durham and B. Killin, for the defendant.

BY THE COURT, UPTON, J. An act was approved on the twenty-sixth day of October, 1868, which provides "the times and places for holding the supreme, circuit and county courts." Section 2 of that act provides the times and places for holding the circuit courts in *all* the districts of the state.

The legislature of 1870 passed an act entitled "an act to amend an act entitled 'an act to provide for the times of holding the supreme, circuit and county courts,'" approved October 28, 1868, which purports to enact "that section 2 of said act be amended so as to read as follows:" and proceeds to set out so much of said section 2 as relates to the first and second districts, making no change in regard to those districts, except to designate the *third* Monday in October instead of the *first* Monday, as one of the times of holding the circuit court in Coos county. This amendatory act makes no mention of the *third, fourth or fifth districts.*

It is claimed that this amendatory section stands now as a substitute for the whole of section 2, of the act of 1868, and that there is now no time fixed by law for holding the circuit courts in the third, fourth or fifth district. There was evidently an inadvertency in drafting the act of 1870, and I am aware that there has been serious apprehension that the matter here presented has resulted in repealing the law fixing the times for holding the circuit courts in this and two other districts. But I trust this apprehension is unfounded. In construing a statute, the purpose is to ascertain what was the intention of the legislature; and a proper application of acknowledged rules of construction will, I trust, dispel all doubts on this subject. It is assumed that this is a case where the words of the statute are clear and precise, and, consequently, admit of no interpretation, and are within the rule laid down in *Jackson v. Lewis* (17 John. 475).

But in order to be within the rule there laid down, the language must not only be clear and precise, but the sense must be manifest, *and it must lead to nothing absurd*. "The maxim, *falsa demonstratio non nocet*, is founded in common sense as well as law, and is not less applicable to statutes than to wills and deeds." (*Watervliet Turnpike Co. v. McKean*, 6 Hill, 616.)

When a literal construction of the words of an act leads to an absurdity, resort will be had to the ordinary means of interpretation, and the court will look to the occasion and necessity of the law, the defects in the former law, and the designed remedy. (*Donaldson v. Wood*, 22 Wend. 395.)

Section 3 of the act of 1870, shows that the object of the act was to change the time of holding the court in Coos County; and that change was made for a particular reason which is expressed in the act. It is difficult, if not impossible, to avoid the conclusion that that was the sole object of the amendment.

If the construction contended for is to obtain an appropriate title, would be, "an act to amend the second subdivision of section 2 of," etc., and to repeal the third, fourth and fifth subdivisions thereof. As no intention to repeal is ex-

pressed, it is a question whether such construction will not conflict with sec. 20 of art. 4 of the constitution.

But if, from all other considerations, this act would be technically a repeal, the difficulty may be avoided by calling up another technicality. The act of 1870 purports to amend an act approved the twenty-eighth of the month. The act providing for holding this term, was approved on the twenty-sixth of October, 1868. One who relies on a technical point, must be fortified against similar objections. I am very confident there is no valid objection to holding the regular term of this court at the present time; and I shall proceed to consider the case presented by the motion.

It is shown by the affidavits, and other proofs on file in the cause, that the plaintiff, being a resident of this state, went to Massachusetts, where the defendant had resided up to that time, and the parties were married at Lowell, in that state, and came to this county, where they lived together until December 20, 1870, at which time the defendant returned to the eastern states with her husband's consent. She claims that she went there for the purpose of visiting her friends, that she intended to return here in a few months, and that her husband promised to send her money for the expenses of her return to this state; and that he failed to send it. The complaint in the cause is based on a charge of adultery, alleged to have been committed while the parties were residing together in this county, and a decree of divorce was rendered in favor of the plaintiff in July last.

The defendant is still in Massachusetts, and claims that she is innocent of the crime charged, that she had no knowledge of this suit, and no reason to apprehend a suit until after the decree was rendered. That she has never received any copy of the summons or complaint, that the plaintiff knew her postoffice address, and that the decree was obtained by artifice and deception. She asks leave to defend; and that the plaintiff be required to furnish means to enable her to meet the expenses of the defense. The plaintiff has sufficient property to meet all necessary expenses of this suit.

The order of publication of summons did not require a copy to be deposited in the postoffice.

The plaintiff claims that the defendant left this state with an intention permanently to separate from him, and with an intention never to return, and that all his proceedings in the action have been in good faith and regular.

This application to open the decree presents a question that is delicate, and yet of such importance as to demand a thorough examination. There are special reasons for great caution in passing upon this kind of an application in a suit for divorce. The enormity of the wrong, if the divorce is obtained by deception, is the greatest of these reasons, but there are others that are of more than ordinary consequence to individuals and to the public. The law gives one year in which to make such an application, and yet the period is only six months, during which the letter of the statute restrains the parties from marrying, and it is evident that the most serious consequences may result from an erroneous decision of a question of this kind.

The present controversy is complicated by uncertainty in regard to the facts. If I was satisfied, either, that the defendant returned to the Atlantic States, intending a permanent separation, or that she received a copy of the process in time to enable her to answer before the default, I should overrule the application.

One of the reasons for holding the case under advisement, after the close of the last term, was an uncertainty in my mind, as to the question whether the defendant had actual knowledge of the pendency of the suit, and a desire to extend the time in which an application similar to this might be made before decree.

The propriety of that course was commended by the circumstances that the affidavit for service by publication was not made by the plaintiff, and the suggestion was of the greater force, in view of the wrong that would be done, if an abuse of the process of the court should be designatedly a means of circumvention, to procure a decree of divorce without notice to an absent party.

We have no means at the present time, of knowing the whole truth in regard to the statements made in support of the

motion. An affidavit made by the defendant herself, has been ruled out, for want of formality in the official certificate attached to it; hence we have not even the defendant's sworn statement in regard to the truth of her allegations. These controverted facts of so serious character are of great public, as well as private, interest; and proof cannot even be presented in regard to them, unless, at least, further time be granted. The first question to be determined, is whether the defendant shall be allowed any further hearing, either on her allegations of fraud and want of notice, or on the merits of the original cause.

If it is true that the plaintiff permitted the defendant to go away with a belief that his affection for her was undiminished, and with the expectation on her part of returning, to spend with him the remainder of their lives, and yet purposed obtaining a decree without her knowledge, the proceeding is such an outrage upon her, upon the court, and upon the public, as to render an investigation an imperative duty.

If, on the contrary, this application is an afterthought, and, as is claimed by the plaintiff, is a mere attempt to extort money, the investigation can do but comparatively little harm.

The affidavit of the defendant's attorney, upon information and belief, which standing alone would scarcely challenge serious consideration, serves as a thread upon which to connect and arrange the facts and circumstances otherwise shown in regard to the time when the parties ceased living together, the manner of their separation, the circumstances of the defendant's departure, the provision made for her, and the commencement of this suit so recently after such separation. These several matters, if not worthy to be called a chain of circumstantial evidence, tend to throw a suspicion over the transaction, that it is very desirable should be removed. And the reasons thus presented in favor of a reexamination of this cause, are greatly strengthened by what appears in relation to the order for service by publication. The affidavit for the order is not made by the plaintiff, but is made by his attorney; and upon the

important subject of the defendant's residence and post-office address, it states only, that the defendant does not reside in this state, and "defendant's residence is unknown, and cannot with reasonable inquiry be ascertained."

On the trial the plaintiff testified that when the defendant left this state it was to go to Lowell, Mass., or Bedford, Maine, and there is very strong reasons to believe the postoffice address of the defendant could have been ascertained by such reasonable inquiry as that of writing or telegraphing to those towns.

But the circumstance that such inquiry does not appear to have been made, and the fact that the affidavit was not made by one having the best means of knowledge, I think may well be considered on this motion. In saying this, I do not design to express any opinion on the question whether the affidavit contained sufficient *prima facie* to warrant the order of publication; but assuming that the order and the service are in conformity with the statute, it seems to me proper to consider whatever may be peculiar in the mode of commencing and prosecuting the suit, if such peculiarity tends to throw light upon the question under consideration. To this end it is proper to notice the situation of the parties and the manner of obtaining service, together with the fact, which I think must be taken as true, that the defendant did not hear of the case in time to answer.

Upon these considerations, I think it my duty to open the decree, and permit the defendant to answer.

It will also be ordered that the plaintiff deposit with the clerk \$250, to enable the defendant to meet the expenses she may incur in the suit; and if the defendant desires to return to this state to make her defense in person, proper steps can be taken to bring about that result; but the plaintiff will not be required to advance any money for that purpose upon any uncertainty as to the use that will be made of it. The defendant's attorney will prepare the form of an order in regard to meeting the expenses.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1871.

JULIEN PROVOST *v.* MILLARD & VAN SCHUYVER.

POWER OF THE COURT OVER PROCESS.—Every court has power to control its own process, and prevent its abuse.

SATISFYING JUDGMENT.—Ordinarily a court has power to direct a decree or judgment, which is of record before it, to be canceled of record, upon a proper showing that it is in fact satisfied.

JURISDICTION.—This court refused to entertain a bill to compel a plaintiff who had obtained a decree of foreclosure in another district to appear there and cancel the decree.

THE complaint shows that these defendants in 1870 commenced a foreclosure suit, in the circuit court in Marion County, against this plaintiff and others who are named, and recovered a decree for \$281.33 and interest, and for the sale of certain lands in said Marion County. That the said premises were sold under said decree, and that these defendants "became the purchasers thereof," and "bid for said lots the sum of \$354.75, and said premises were duly struck off to them on said bid." That the sheriff made out a certificate, which these defendants refused to accept, and alleged that their bid was induced by misrepresentations.

The plaintiff alleges that by reason of the said sale "the said decree is fully paid and satisfied, and that the same ought to be satisfied of record by the said defendants;" but that the said defendants neglect and refuse to satisfy the said decree; and that the said defendants have sued out an *alias* execution on said decree.

The defendants demur on the grounds that: This court has no jurisdiction of the matter set up in the complaint, and that the complaint does not state facts sufficient to constitute a cause of action.

Hill, Thayer & Williams, for the plaintiff.

Sullivan & Thompson, for the defendants.

UPTON, J. This complaint is of course addressed to the equity side of the court; the relief prayed is not such as a court of law can administer. Were it a judgment or a

decree of this court that it was proposed to cause to be satisfied of record, the necessary steps could be taken by motion, as well in an action at law as in a suit in equity; but a court of law has no process that would afford the relief the plaintiff in this cause claims.

Upon the same principle that equity will not interfere where a party has a plain, speedy and adequate remedy at law, I think a court of equity should not interfere or attempt to meddle with a proceeding of another court in which the parties have appeared, and to the control of which the question submitted is subject. I think that it appears by the complaint that the plaintiff has an adequate remedy in that court.

The gist of the complaint here is, that the decree of that court ought to be satisfied of record, that it is not satisfied, and that these defendants have caused an execution to issue.

There is certainly no more necessary rule, nor one better settled, than that every court has power to control its own process to prevent its abuse. Ordinarily, a court has power to direct its own decree or judgment, to be canceled of record, upon a proper showing that it is in fact satisfied; and to that end there can be no doubt the court has all requisite power over parties, to such judgments and decrees, who have voluntarily come before the court or have been duly brought before the court by its process. I think, therefore, that this plaintiff has a plain, speedy and adequate remedy by applying to the court that has control of the decree and of all process that may be applied for under the decree.

The bill of complaint should be dismissed.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1871.

W. F. WILCOX *v.* M. KEITH *et al.*

MECHANIC'S LIEN.—In a proceeding to enforce a mechanics' lien under the statute, the complaint should show that the contract was made with an owner or his agent.

In a proceeding under the statute to enforce a mechanics' lien, the complaint alleged that the contract was made with said M. Keith, *as* owner of the building. The defendant demurred.

By THE COURT, UPTON, J. It is a material point that the contract be made with the owner of the building, and unless it is so made there is no lien. The complaint should show every fact requisite to establish the existence of the lien. It should be direct and certain as to the allegation that the contract was made with the owner of the building; or, to use the language of the statute, it must be made with the owner of the building, "or with the agent of such owner."

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CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1871.

WILLIAM MAROONEY, RESPONDENT, *v.* JAMES MCKAY,
PETITIONER.

PRACTICE.—By the summons it appeared that the court was held in Couch precinct, in Multnomah County; in the return, the constable described himself as, "constable of Couch precinct," without naming the county; the return was held sufficient.

IDEM.—A copy of the complaint, certified by the justice of the peace, is sufficiently certified to authorize its service with the summons.

THE plaintiff obtained judgment before a justice of the peace in an action for work and labor, and the case comes into this court upon a writ of review on petition of the defendant.

In the return on the summons the constable gives his official title, "constable of Couch precinct," without naming the county.

The complaint was in writing, was certified by the justice of the peace only.

The petitioner claims that he was not duly served with summons in the action, and that the justice failed to acquire jurisdiction, in this:

1st. The record does not show that the summons was served by a constable of this county.

2d. The copy of the complaint was not properly certified.

Mitchell & Dolph, for the petitioner.

O. P. Mason, for the respondent.

BY THE COURT, UPTON, J. It is shown on the summons that the court is held in Couch precinct, in Multnomah County. The summons and return being read as one instrument show in what county, as well as precinct, the constable held office.

The point in regard to certifying to the copy of complaint in a justice's court, raises a question of practice which appears not to have been decided. The general practice act requires that the copy of the complaint, served with the summons, should be certified "by the plaintiff, his agent or attorney, or by the county clerk;" and the act regulating the practice in justices' courts does not expressly mention the subject of certifying, but it provides that the pleadings may be oral or in writing, and, "when the complaint is made orally, the justice must endorse the substance of the same upon the summons." I think that a copy of complaint certified by the justice before whom the cause is pending, may be held sufficient, either upon the assumption that where there is no clerk, *eo nomine*, the act may be done by the officer whose duties include the labors usually performed by a clerk; or, since the act when done by the justice of the peace is, of course, done on the motion and implied request of the plaintiff, it may be considered done by his agent.

I cannot think the statute demands such literal and arbitrary construction as to justify reversing a judgment because the copy of the complaint served with the summons was certified by the justice of the peace only.

The judgment should be affirmed.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1871.

W. A. HOLBROOK *et al.* v. W. W. PAGE *et al.*

PLEADING.—Averments in the answer not presenting issuable facts will be struck out on motion.

REDUNDANCY.—Express admissions of facts alleged in the complaint are unnecessary, and may be struck from the answer as redundant.

MOTION TO STRIKE OUT.—Where a part of that to which a specific objection is pointed is properly pleaded, the objection will not be sustained.

THE plaintiffs are owners of lot 2, and the defendants are owners of lot 1, in block 182 in the city of Portland, and the controversy relates to the locality of the line between those lots. It presents the question whether that line is fifty feet, or whether it is fifty-seven feet, south of the south line of Salmon street, *as that street is now used and occupied.* A motion is made to strike out parts of the answer.

The complaint states that the plaintiffs are owners in fee simple, and have a right to the possession of lot 2, in block 182; states that the block is two hundred feet square, and bounded on the north by Salmon street. "That said lot No. 2 is the south half of the northeast one quarter of said block, fronting fifty feet on Sixth street, and running back one hundred feet in depth, its northern boundary line being parallel with and fifty feet distant from the south line of Salmon street, as the same is now used and occupied." That the defendants are in possession of and wrongfully withhold from the said plaintiffs a strip of land ten feet in width off from the northerly side of said lot No. 2, running back one hundred feet, the depth of the lot. The plaintiffs claim the land and \$200 damages.

The answer contains a denial that the defendant has been in possession or has detained any part of lot 2 in said block; and avers that the north boundary line of said lot No. 2 is *fifty-seven* feet distant from the south line of Salmon street, as the same is now used and occupied. That the defendants are owners in fee simple of lot 1 in said block, and that the south boundary line of said lot 1 is *fifty-seven* feet distant

from the south line of Salmon street, as said street is now used and occupied.

In addition to the foregoing, and to some other denials, the answer contains the following statements, each of which the plaintiffs move to strike out as sham, frivolous and irrelevant:

1st. The defendants "aver that the plaintiffs now are, and for a long timepast have been in possession of lot No. 2, in block No. 182, in said city, as the same was originally laid out, platted and sold by the patentees from the government of the United States, and as the same was conveyed to and purchased by their ancestor and his grantors under whom the plaintiffs derive title."

2d. Defendants admit that the said block No. 182 is a parcel of land two hundred feet square, bounded on the north by Salmon street, east by Sixth street, south by Main street, and on the west by Seventh street, but not as such streets are now used and occupied.

3d. The defendants aver that such south boundary line of lot No. 1, and division line between said lots 1 and 2, in block 182, was established long since, by mutual consent and agreement between these defendants and the then owners of lot No. 2 in said block; and that fences were built at the time of said agreement, concerning said boundary and division, at the common expense and cost of these defendants and the owners of said lot No. 2, in accordance with and on the said southern boundary line of lot No. 1 and division line of lots No. 1 and No. 2. That said fence now stands, and makes the division line between said lots. That since said agreement these defendants have made valuable and permanent improvements on said land adjacent and abutting said boundary line and fence, viz: buildings of the value of \$5,000. That said buildings and improvements were made upon said lot No. 1 by the defendants upon the faith of the location of said boundary line established and agreed upon as aforesaid, all of which these plaintiffs and their ancestors well knew.

Wm. Strong, for the plaintiffs.

Page & Bingham, for the defendants.

BY THE COURT. The first branch of this motion should be granted. The matter pleaded is vague and indefinite. It assumes that there has been some original laying out, platting and selling which is material, and it states a conclusion based upon that assumption; but it is indefinite and states nothing that is material as to the time of the plaintiff's possession. It presents a conclusion, and not a issuable fact.

The second matter alluded to is wholly redundant. It is not necessary in an answer to expressly admit any part of the complaint. If this were a direct admission it would be surplusage, but it neither admits or denies directly any material allegation nor presents anything upon which an issue can be formed.

As to the defense last specified in the motion, the only part upon which I think there can be any question is that which sets up a mutual agreement settling the boundary. A contract of that kind, duly made, would be a good defense, and might well be set up by answer, unless the setting it up specifically is unnecessary, on the ground that the defendant could give it in evidence under the allegation that he is owner in fee.

If there is any doubt upon the question whether such an agreement adjusting a controverted boundary, ought to be specially plead, the doubt is a sufficient reason for refusing to strike out. If a part of that which is included in this branch of the motion ought to be retained, the whole that is included in this part of the motion must also be retained.

The first and second propositions of the motion will be granted, and the third branch overruled.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1871.

E. B. DUFER v. THOMAS CULLY.

DAMAGES.—CONTRIBUTORY NEGLIGENCE.—A plaintiff who sues for damages for negligence, must not himself be guilty of any fault that contributed to the injury.

NOTICE.—DOMESTIC ANIMALS.—The owner of a domestic animal is not in general liable for injuries resulting from the vicious disposition of the animal, unless he is chargeable with notice.

IDEM.—Where in trespass *quare clausam fregit*, the defendant is considered liable without notice for injuries resulting from the vicious disposition of the animal, it is an exception, and is based upon the wrong committed in breaking the plaintiff's clothes.

THE plaintiff sues to recover damages for wounds and injuries to his person, caused by a vicious bull, the property of the defendant, alleged to have been wrongfully permitted to run at large.

The answer denies knowledge that the bull was of dangerous or ferocious disposition. Denies that the bull was wrongfully at large. Denies that the bull pushed or struck the plaintiff.

The case was tried before a jury. The evidence tended to show that the bull, with several other of the defendant's animals, was running at large upon unoccupied lands of the neighborhood, that the bull strayed into, or broke into the plaintiff's enclosures, and the plaintiff, with two other men, went to drive the bull away, the plaintiff being armed with a pitchfork; and that after the bull was driven into the highway, the bull made a fierce charge upon the plaintiff, knocked the plaintiff down, giving to him a very painful, and what appeared to be an extremely dangerous wound, from which, however, the plaintiff recovered in a few weeks. The pitchfork with which the defendant sought to defend himself, was broken off at the shank, and the tines of the fork were carried away in the scalp of the bull where they remained until forcibly extracted after the bull reached the defendant's premises.

The evidence was conflicting, as to whether the defendant

knew of the vicious character of the bull. And the defendant attempted to draw out, on cross-examination, that the plaintiff unnecessarily vexed the animal.

On the trial, it was questioned whether evidence of the defendant's knowledge of the vicious character of the bull was material.

Hill, Thayer & Williams, for the plaintiff, cited *Van Leuven v. Lyke*, 1 Comst. 515, and claimed that the defendant is liable, in the absence of such knowledge.

J. H. Reed, contra, cited *Tift v. Tift*, 4 Denio, 175; *Vrooman v. Sawyer*, 13 John. 339.

BY THE COURT. I think the evidence of the defendant's knowledge, is pertinent. This is not an action for a breaking of the plaintiff's close, and the complaint does not charge a trespass on the plaintiff's premises. The case of *Van Leuven v. Lyke*, and the authorities there cited touching the point, sustain the general doctrine that the *scienter* must be proved to render the owner of a domestic animal liable, but recognize as an exception, that "this rule does not apply when the mischief is done by such animals while committing a trespass upon the close of another." These authorities base the exception upon the principle, that the common law holds a man answerable, not only for his own trespass, but also for that of his domestic animals, and as it is natural for such animals as horses, oxen, sheep and swine to rove, the owner is to take notice of the propensity at his peril, and held that where the action is trespass *quare clausam fregit*, proof that the animal was trespassing on the plaintiff's grounds at the time, excuses proof of knowledge of the animal's vicious propensity.

The court distinctly held that proof of the *scienter* was necessary in that case, and placed the necessity on the ground that there was no allegation of a breach of the close. All the cases cited, go to the extent that when the vicious disposition of the animal is the foundation of the action, knowledge of that disposition should be brought home to the owner of the animal.

The defendant requested the court to instruct the jury, that:

1. "A plaintiff who sues for damages for negligence, as in this case, must himself be without fault;" in lieu of which the following was given.

A plaintiff who sues for damages for negligence, as in this case, must not himself be guilty of any fault that contributed to the injury.

The following instructions, requested by the defendant, were given as asked:

2. To render the owner of a domestic animal liable for an injury committed by such animal, from its vicious propensity, it must be shown that the defendant had notice of its vicious propensity, or that he had reason to apprehend that the animal would do similar mischief to that complained of in the complaint.

3. In the complaint in this case, there is no allegation charging that the defendant's bull did any act for which the law holds the defendant liable, without proving a *scienter*.

4. If the defendant had no notice or knowledge that his bull had done or was disposed to do similar acts to those alleged in the complaint, the plaintiff can not recover.

5. If the bull was vicious, and had previously committed injuries similar to those alleged in the complaint, the plaintiff can not recover, if the injuries alleged in the complaint to have been received were brought about by the acts and aggressions of the plaintiff.

The verdict was for the defendant.

IN THE CIRCUIT COURT FOR THE COUNTY OF BENTON.

J. D. RUSSELL, PLAINTIFF, v. H. C. LEWIS, DEFENDANT.

COUNTY COURT.—PROBATE.—JURISDICTION.—The county court is to be regarded in probate proceedings as a superior jurisdiction; it being a court of record deriving its power as a probate court from the constitution. And when its orders for the sale of real and personal property of deceased persons appear to have been regularly made, reciting all the jurisdictional facts necessary to authorize the order, no presumption will be indulged against the recitals, and extrinsic evidence of their truth is not necessary, but the burden of showing that the court has not acquired jurisdiction is on the party who disputes the truth of the recital.

ORDER OF SALE.—MISTAKE IN DATE.—PRESUMPTION.—The order of sale recited notice to all persons "to appear on this day;" an order to show cause was made returnable on the fifth of April, but the heading of the order of sale was, "at a term of the court began and held on the first Monday, the fourth of April," etc.: *Held*, that a mistake in making up the record will be presumed, rather than that the order was made before the return day.

Chenowith, for plaintiff.

Strahan & Burnett, for defendant.

THAYER, J. This was an action to recover certain real property, situate in Benton County, Oregon. The plaintiff claimed title to it as one of the heirs at law of Robert W. Russell, deceased.

The defendant claimed title to the property by virtue of certain proceedings in probate, had in the county court of Benton County, Oregon, under which the property was sold, and claimed to have been acquired by the defendant, through mesne conveyances from the purchasers under the probate proceedings.

It appears that Robert W. Russell died in said county of Benton, about the first of the year 1860, intestate, seized of certain real estate, including the property in question; that he left no wife, children, father nor mother; that the plaintiff was a brother of deceased, and entitled to inherit the one third of his property, and would be the owner of a one third interest in the land in question, if not divested of title by the probate proceedings. It was admitted in the outset,

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3	380
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upon the trial, that one Gallatin Adkins was, on the sixth day of February, 1860, duly appointed by the said county court for Benton County, the administrator of the estate of the said Robert W. Russell, and that he duly qualified and entered upon the discharge of his trust as such administrator. The defendant gave in evidence, subject to objection by plaintiff's counsel, certain orders granted by the said county court for Benton County, during the year 1864, in proceedings in probate, in the matter of the estate of the said Robert W. Russell, deceased, among which was an order to show cause why the property in question should not be sold; also an order confirming the sale thereof, reported by the administrator to have been made, and a deed executed by the said administrator upon such sale to certain parties, and plaintiff had admitted that defendant had acquired all the right in the property which said parties received under said administrator's said deed. The several orders appeared to have been regularly made and recited all the jurisdictional facts necessary to authorize the said county court to grant such orders, and the said deed of the administrator was regular upon its face, and appeared to have been executed in accordance with said orders, and the proceedings thereupon had. Plaintiff's counsel contends, however, that neither of said orders, nor the administrator's deed, should be admitted in evidence without first proving the necessary facts authorizing county courts to make such orders in like cases. This presents the main question in the case. That is, whether county courts of the state of Oregon, in probate proceedings, are to be regarded as courts of inferior or superior jurisdiction. If those courts, in the exercise of probate jurisdiction, are to be regarded as courts of special and limited jurisdiction, then the position of plaintiff's counsel is correct. But, on the contrary, if they are courts of general jurisdiction in such cases, their jurisdiction to make orders of that character will be presumed without any proof of the particular facts necessary to confer jurisdiction. These various orders of the county court for Benton County were judicial records. (See sec. 719, Civil Code, Stat. p. 328.) "The jurisdiction sufficient to sus-

tain a record is jurisdiction over the cause, over the parties and over the thing, when a specific thing is the subject of the determination." (See Stat. p. 330, sec. 732.) The jurisdiction of county courts, in probate matters, is derived from the constitution of the state of Oregon. (See sec. 12, art. VII, Const. Stat. p. 114.) And this jurisdiction, among other things, is to order the sale and disposal of the real and personal property of deceased persons, and is made exclusive. (See Stat. p. 365, sec. 869.) Section 731 of the civil code provides how any judicial record may be impeached, and the presumption arising therefrom overcome, by evidence of a want of jurisdiction. These orders were necessarily judicial records, in every sense of the term; they were the record of the proceedings in a court of justice, being a court of record, having general jurisdiction. (See sec. 1, art. VII, Const., which is as follows: The judicial power of the state shall be vested in a supreme court, circuit court, and county court, which shall be courts of record, *having general jurisdiction*, to be defined, limited and regulated by law, in accordance with this constitution. Justices of the peace may also be invested with *limited judicial powers*, and municipal courts may be created to administer the regulations of incorporated towns and cities.) This was a part of the judicial power of the state. There is no very satisfactory test to distinguish between superior and inferior courts. The supreme court, in the case of *Grignons' lessee, v. Astor* (2 How. U. S. Rep. p. 341, a case similar to this), said that "the true line of distinction between courts of general jurisdiction and courts of special and limited jurisdiction is this: 'A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the former description; but a court which is so constituted that its judgment can be looked through for the facts and evidence necessary to sustain it, whose decision is not evidence of itself to show jurisdiction, is of the latter description.'" But the difficulty is to ascer-

tain when a particular court is competent to decide on its jurisdiction. The rule which classifies the two kinds of jurisdiction cannot be a mere arbitrary direction.

The court, however, in the last case referred to, did say that all courts of record which have an original general jurisdiction over any particular subject are not courts of special or limited jurisdiction. In the case of *Kemp, lessee, v. Kennedy* (5 Cranch U. S. Rep. p. 173), the question arose as to whether the court of common pleas of the state of New Jersey was a superior court of general jurisdiction, or a court of special and limited jurisdiction. That was an action of ejectment for the recovery of certain real property, which had been adjudged by the common pleas court to have been forfeited by one Kemp, for treason against the laws of that state. Chief Justice Marshall, in delivering the opinion of the court, says:

"In considering this question, the constitution and powers of the court, in which the judgment referring to the judgment of forfeiture was rendered, must be inspected. It is understood to be a court of record, possessing, in civil cases, a general jurisdiction to any amount, with the exception of suits for real property. * * * In treason the jurisdiction was over all who could commit the offense. * * * In respect to treason, then, it is a court of general jurisdiction, so far as respects the property of the accused." And the court held that while the judgment of forfeiture was erroneous, yet it was not void; that it had the effect to divest Kemp of the title to his property. Some of the New York courts, in determining this question, say that "to constitute a court a superior court, as to any class of actions, within the rule that the jurisdiction of a superior court may be presumed, its jurisdiction of such actions must be unconditional; so that the only thing essential to enable the court to take cognizance of them is the acquisition of jurisdiction of the person of the parties. (See Abbot N. Y. Digest, vol. 2, sec. 8, p. 261.)

I think the rule above stated goes too far, as under that test it would be difficult to see how the circuit courts of the United States could be regarded as superior courts in the

exercise of civil jurisdiction, as their jurisdiction in civil cases is not *unconditional*, but depends upon special circumstances, such as the controversy being between citizens of different states, and yet they are admitted to stand on the same footing with courts of general jurisdiction. (See *Buchanan v. Cowell*, 1 N. Y. Rep. p. 507.)

It appears to me that a court of record, vested generally by the constitution with any particular part of the judicial power of the state, in the exercise of that jurisdiction must, in the technical sense of the word, be considered a court of superior jurisdiction. And I do not see how, under a correct construction of the several provisions of the constitution and statutes before mentioned, they could be regarded otherwise. In that view of the case the authority to hear and determine the matter of the sale of property in question must be presumed, and that presumption can only be overcome by evidence of a want of jurisdiction in the court to determine that matter. I do not question the right to impeach the adjudication. No court can render a binding or valid judgment without first having jurisdiction over the subject matter; and, second, acquiring jurisdiction over the party to be effected, and as to whether a court had jurisdiction when it has assumed to decide is always a pertinent subject of inquiry, either in direct or collateral proceedings. (See the *Chemung Canal Bank v. Judson*, 8 N. Y. Rep. court of appeals, p. 254; *Dobson v. Pearce*, 11 Id. 164, per W. F. Allen, J.) This right, however, to inquire into the jurisdiction of a court does not, at least in the determining upon the validity of proceedings in our own courts in collateral actions, include the right to controvert the return of an officer, showing that service of process has been regularly made. The law, for certain reasons, founded on public policy, makes such returns in collateral proceedings conclusive, but this does not deny or affect the right to disprove the bare presumption of jurisdiction, nor preclude a party from controverting a mere recital in the record. (See 4 Conn. p. 280; 5 Wend. 148.)

In the case under consideration, it has not been shown that the county court for Benton county did not acquire

jurisdiction of the probate proceedings. It was necessary, of course, that the court first acquire jurisdiction in order to make a judicial record of any validity. But as jurisdiction in this case is presumed in favor of the record; the burden of proof that it did not acquire jurisdiction was with the plaintiff. The plaintiff's counsel also insists that the order of sale was irregular and void, for the reason that it was made on the fourth day of April, 1864, when the order to show cause why the sale should not be decreed was not returnable until the next day—the fifth day of April, 1864. I do not propose to decide what would be the effect of such an irregularity, if such were the fact; but I am not satisfied that such is the case. The order of sale recites as follows: "That legal notice has been given, notifying all persons to appear upon this day," which refers to the day on which it was granted, as there is no doubt but that the order to show cause was returnable on that day. It would be inferred, however, from the caption of the order of sale, that it was granted on the fourth day of April. I cannot believe that the county court would grant an order requiring persons interested to show cause, on the fifth day of April, why the property should not be sold, and then decree the sale on the fourth day of April. If the evidence fully established the fact, I would have no other alternative; but from all I can see I am inclined to believe there has been a mistake in making up the record, that the order of sale was not granted on the day the caption would indicate. Mistakes of that character will be presumed rather than to suppose a court would commit such an apparent blunder. (See *Moore v. Tracy*, 7 Wend. p. 231.) The heading or the order is as follows: "At a term of the court began and held on the first Monday, the fourth day of April," &c. Then follows the proceedings. I do not think it a necessary inference from that fact, that the order was granted on the first day of the term. It might have been granted on a subsequent day in the term, and I presume it was in fact granted upon the fifth instead of the fourth day of April.

Judgment for defendant, with costs and disbursements.

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CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1872.

A. P. ANKENY *et al.* v. MULTNOMAH COUNTY.

A NOTE payable at a specified place in this state is an "indebtedness within this state," within the meaning of the revenue law, notwithstanding the owner of the note may be a non-resident and absent.

THIS case comes before the court upon a writ of review, directed to the county court, sitting as a court for the transaction of county business. The parties submitted an agreed statement of facts to the following effect:

The petitioners were assessed in 1871 for certain lots of land owned by them, valued at \$64,000. At the time of the assessment the petitioners were indebted in the sum of \$10,000 upon a promissory note, secured by a mortgage on a portion of the said land, valued at \$24,000. The note was made payable to A. R. Eddy, at the bank of British Columbia, in Portland, Oregon; and the said Eddy was not in Oregon nor a resident of the state.

Both the assessor and the county court refused to deduct the indebtedness secured by the note and mortgage from the valuation of the petitioners' property.

Shattuck & Killin, for the petitioners.

A. C. Gibbs, district attorney.

UPTON, J. The statute (Gen. L. p. 628. sec. 1, amended in 1865) provides that the assessor shall "deduct the amount of indebtedness within this state of any person assessed."

The case presents the question whether the amount specified in a note, which is payable at a particular place in this state, should be deducted, notwithstanding the owner of the note may be absent from and a non-resident of the state.

In *Johnson v. Oregon City* (2 Oregon, 327) it was held in this court and on appeal, that the place where a promissory note is taxable, depends on the residence or location of the

owner of the note, and not upon the place where the paper, which is the evidence of the indebtedness, may be temporarily deposited.

The district attorney claims that, upon the principles there laid down, the indebtedness under consideration follows the person of Mr. Eddy, the owner of the note.

The counsel for the petitioners claim that, by stipulating in the note for a particular place of payment, the parties have limited the character of the contract in this particular, and that this note does not evidence an indebtedness which the owner of the demand can carry out of the state at his will.

It is certain that the words fixing a place of payment do affect the nature of the contract in some respects. They limit the rights and liabilities of the parties in several particulars, and the place of payment is a material part of the contract. (*Bowen v. Newell*, 13 N. Y. 290; *Troy City Bank v. Lauman*, 19 N. Y. 477; *Lee v. Selleck*, 33 N. Y. 615.)

If the case turned upon the same point that was before the court in *Johnson v. Oregon City*, the decision there made would settle the question in favor of the county; but the statute should not receive the same construction it would have borne if the legislature, in defining the exemption, had used the words, "the amount of indebtedness *that is taxable in this state.*" It is not in the power of the holder of the note to change the place of payment; the petitioners have by their contract reserved the right to transact the business in this state, and to prevent a cause of action from arising upon this note in any other state. If the terms of the contract are carried out, the money that is payable will be in this state after it has left the hands of the makers of the note, and will be subject to the payment of any taxes the state may impose upon it.

I think by the terms of the statute the amount of the note should be deducted from the petitioners' assessment; and a judgment will be entered to that effect.

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1872.

A. P. ANKENY v. MULTNOMAH COUNTY.

AN ordinary promissory note, the owner of which is absent from this state, is not an "indebtedness to this state," which can be deducted from the debtor's assessment.

UPTON, J. This case presents facts similar to those of the case of *A. P. Ankeny et al. v. Multnomah County*, except that the note in this case was given by the petitioner to Jemima Wheeler, who is absent from the state, for \$15,000, and it does not appear that any particular place of payment is designated in the note. The agreed case contains the statement that the note "was or is payable in Portland," and shows that the money was used in making improvements on the property which is assessed to the petitioner.

The fact that the money went into improvements and was thus taxed, is not a matter which the statute authorizes the court to consider; and the statement in the alternative, that the note was or is payable in Portland, does not justify the conclusion that payment could not be enforced at any other place; but it must be treated as an ordinary promissory note; and according to the decision in *Johnson v. Oregon City*, its *situs* is with its owner. When Mrs. Wheeler left the state, she carried with her the property in the note, and the right to bring an action upon it in any other country in which the maker or his property may be found. As the property in the note was no longer in this state after she departed, and the petitioner retained no right to satisfy it in this state, I think it cannot be treated as a deduction authorized by the statute, and that the proceeding of the county court should be affirmed.

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1872.

MRS. N. J. GASTON *et al.* v. M. L. McLERAN *et al.*

AN answer setting up usury, must aver clearly every particular necessary to establish the usury charged, and must distinctly negative every supposable fact which, if true, would render the transaction innocent or lawful. It seems more consonant with rules of construction, to hold a stipulation for reasonable attorney's fees, in case of suit, to refer to the fees given by statute, than to hold that the parties have by such stipulation rendered a contract usurious, which would otherwise have been innocent.

THIS is a suit to foreclose a mortgage executed by the defendants in favor of the plaintiff, Mrs. N. J. Gaston, to secure a promissory note, in form as follows:

"\$2,000 PORTLAND, OREGON, December 14, 1870.

"Twelve months after date, without grace, we jointly and severally promise to pay to the order of Mrs. N. J. Gaston, at the First National Bank of Portland, Two Thousand Dollars, for value received, with interest from date thereof until paid, at one per cent. per month, principal and interest both payable in United States gold coin; interest payable quarter-annually, and in case suit is instituted to collect the note or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable, as attorney's fees in said suit. Due, Dec. 14, 1871.

"M. L. McLERAN,
"R. S. McLERAN,
"F. W. McLERAN."

The plaintiff alleges that \$100.00 is a reasonable attorney's fee in the suit. The first defense set up in the *answer* is in the following words: "Defendants answering the complaint of the plaintiff in the above entitled suit, admit that the defendants, M. L. McLeran, R. S. McLeran, and F. W. McLeran, executed the note set forth in said complaint, but defendants deny that any of them received the sum of \$2,000 as the consideration of the said note, or any other or greater sum than \$1,960, and that said note was and is usurious."

The *answer* "for a further and separate defense," states the note was given in pursuance to a mutual agreement,

that the defendants should pay, "upon the full face of said note, more than legal interest, and a greater rate of interest than allowed by law, to wit: "interest at the rate of one per cent. per month, and such further sum as the court might adjudge reasonable as attorney's fees, in case suit should be instituted to collect said note, or any portion thereof, which sum is claimed by the plaintiffs in this suit to be one hundred dollars, and said note is usurious." *The answer* denies that \$100 is a reasonable attorney's fee, and alleges that \$50 is a reasonable attorney's fee in this suit. It also denies that the plaintiffs are entitled to recover said sum of \$100, or any sum from the defendants, or any of them as attorney's fees, and denies that the defendants jointly or otherwise owe the plaintiffs any sum except \$1,960 and interest since the fourteenth day of September, 1871, at one per cent. per month. And the defendants pray that judgment for \$1,960 be rendered against them in favor of the State of Oregon, for the use of the Common School Fund.

The plaintiffs "demur specially to the first paragraph of said answer, and they also demur specially to the second paragraph thereof" (containing the said further and separate defense), and for cause say, "that neither of said paragraphs state facts sufficient to constitute a defense."

Shattuck & Killin, for the plaintiffs.

Mitchell & Dolph, for the defendants.

UPRON, J., delivered the following opinion: The defense set up in the first paragraph of the answer is insufficient. The declarations of the defendants as to what they admit, can be of no consequence; as a matter of law they admit whatever material allegation of the complaint they do not directly deny. What is said on the subject of admissions being disregarded; there remains the words, "defendants deny that they received the sum of \$2,000, as the consideration of said note, or any other greater sum than \$1,960, and that said note was and is usurious." If we supply words and treat the last cause, not as a denial, but as an allegation that the note is usurious, the allegation will not be the

statement of facts constituting a defense, and will not of itself be sufficient. (*Gould v. Horner*, 12 Barb. 601.) This clause, declaring that the note is usurious, neither adds to nor modifies the preceding denial, nor does the denial add to the clause. The law intends that the pleader should state only material facts, and it adds nothing to this defense to set forth the conclusion that the note is usurious. The negation contained in the first defense is simply a denial that the consideration for the note was any other or greater sum than \$1,960. The only allegation of the complaint in regard to the consideration being that the note was "for value received," this denial does not meet or traverse any allegation of the complaint, and it does not appear from the complaint and this branch of the answer, taken together, that the note was for money loaned.

An answer of usury must aver clearly every particular necessary to establish the usury charged, and must distinctly negative every supposable fact which, if true, would render the transaction innocent or lawful. (*Banks v. Van Antwerp*, 15 How. Pr. 29; *Watson v. Bailey*, 2 Duer. 509.)

As to the second defense demurred to, that is, what is called a further and separate defense, I think it does not set up any new matter, or deny anything alleged in the complaint.

The complaint shows that it was the agreement of the parties that the defendant should pay the full face of the note, and interest at the rate of one per cent. per month, and such additional sum as the court may adjudge reasonable as attorney's fees, in case of suit instituted; and it shows that such sum, or reasonable value, is claimed by the plaintiff to be \$100. The defendant repeats these facts, and adds the allegation: "And said note is usurious."

This last allegation, we have just seen, is insufficient; it is not the statement of a fact, and the pleader has not added anything to his defense by reiterating the facts already set forth in the complaint, before stating the conclusion, that the note is usurious.

If such an answer raises any question, it is a question of law, such as might be raised by demurrer; it presents no

issue of fact, and it is unnecessary to say that a party cannot, at the same time, both answer and demur to the same matter. If there were no other objection to this defense, it would be fatally defective because of its failure, either to meet and deny facts set up in the complaint, or to set up new matter constituting a defense.

In addition to the objections made to the form of the pleading, there was on the argument much discussion of the question, whether or not, inserting such a provision in relation to attorney's fees as is contained in this note will have the effect to render a contract usurious, where the note, as in this case, expressly provides for as great interest as the law will permit. I am not called upon by any question raised in this case to express an opinion on the effect of a stipulation in a promissory note, to pay a certain sum of money by way of indemnity, or of attorney's fees, in case of an action or suit. The practice of this court has been to give force to such stipulation, but I am not aware that an objection to that course has ever presented a contested case. In this case the parties have not stipulated for a definite sum, but for such sum as the court may adjudge reasonable. This form of the stipulation presents two other considerations, either of which when properly presented may become decisive of the sufficiency of the matter attempted to be set up by the answer.

1st. Would a court adjudge any sum reasonable, if its enforcement would be unlawful, or if such adjudication would render the whole contract usurious?

2d. If the court is called upon to adjudge what sum it is reasonable for the prevailing party to recover as attorney's fees, could the court, as a matter of law, adjudge any other sum than is provided by the code?

Section 538 of the code provides that "there may be allowed to the prevailing party, in the judgment or decree, certain sums by way of indemnity for his attorney fees in maintaining the actions or defenses thereto, which allowances are termed costs." And section 542 specifies definitely the amounts that shall be thus allowed.

It seems to me far more consistent with rules of con-

struction, to hold a stipulation in a note, for the recovery of such sum as the court may adjudge reasonable as attorney's fees, to be merely giving expression in words to that which would have been implied by the law without any express promise, than to hold that, by inserting such words in the contract, the parties have rendered the whole contract usurious and unlawful.

It can hardly be supposed that the parties intended that the amount should be ascertained by the trial of an issue of fact, since in ordinary cases of non-payment when there is no defense on the merits to the principal cause of suit, and no occasion for an answer except in relation to the amount of the fee, stipulating for such a mode of ascertaining the amount would necessitate the taking of testimony, and would greatly add to the expense and delay, without any corresponding advantage.

Whatever construction may be hereafter given to the stipulation in regard to attorney's fees, the defenses specified in the demurrer are insufficient and the demurrer must be sustained.

No application was made for leave to amend, and judgment was rendered for the plaintiff for the \$2,000 and interest, and for \$50 on account of attorney's fee, in accordance with the admission contained in the answer.

The defendant moved for a *new trial*, assigning as error the allowing of an attorney's fee greater than that prescribed by section 542 of the code.

The motion was overruled.

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1872.

EMERANCE GROSLOUIS v. S. NORTHCUT.

DONATION LAW.—JUDICIAL SALE.—A claimant under the donation law, may, before patent issues, obtain such an interest in the land as will be subject to judicial sale.

STIPULATION.—In construing a stipulation filed in the cause, the intention of the parties is to be determined from the language used in the written stipulation. A stipulation that the party was divorced in a designated suit is, in effect, an admission that the court had jurisdiction to grant the divorce.

DIVORCE.—POWER OF THE COURT.—Whether, under the act of 1854 concerning divorce, the court had power to transfer, in fee, the lands of a party to the children. *Query?*

IDEM.—PLEADINGS.—In a divorce suit where the pleadings make no reference to the property, the court cannot render a valid decree transferring from the wife to the children of the parties an estate in fee simple in a particular parcel of land.

PRESUMPTION OF JURISDICTION.—Every reasonable intendment will be invoked in support of the judgment or decree of a court of general jurisdiction.

INCIDENTAL POWER.—PLEADING.—Special disposition of the real estate of the parties, although incidental to the subject of the divorce, is within the provisions of the code requiring the complaint to state facts.

PLEADING.—DECREE, WHEN VOID.—After a decree has become final, any colorable statement of facts is sufficient to prevent the decree from being held void, but there must be some statements sufficiently general to comprehend the requisite facts by fair intendment. If there is nothing in the facts stated in the pleadings that would, if denied, render proofs necessary, no intendment in favor of the decision will arise to aid or supply an omission of essential facts.

THIS is an action of ejectment for the north half of a parcel of land known as the Petit land claim. The plaintiff was formerly the wife of Hubert Petit, but he obtained a decree of divorce against her in a suit commenced in 1857. Prior to that time Hubert Petit and his said wife were settled upon said land claim, and in 1871 a patent was issued in pursuance of their settlement and claim, granting to the said Hubert Petit the south half of said land claim, "and unto his wife, the said Emerance Petit, and to her heirs, the north half." The plaintiff claims title under this patent.

The defendant, to establish title in himself, claims that

by the decree in the suit for divorce, the title to the north half of the tract was vested in two minor children of the said Hubert and of this plaintiff, and that afterwards a guardian was appointed by the probate court, and the premises sold at a guardian's sale to the defendant.

By a stipulation on file the following facts are admitted:

Prior to September, 1857, the plaintiff was the wife of Hubert Petit, and she is now the wife of Peter GrosLouis. In September, 1857, said Hubert and this plaintiff were divorced by a decree, of which exhibit "S" is a copy. They then had two children, named Adelaide and Josephine Petit, and were owners of the said land claim. It was also expressed in the stipulation that the "plaintiff does not waive any objections she may have or desire to make to the validity, legality or sufficiency of any of the records produced by the defendant."

A jury trial was waived. The plaintiff introduced the patent and rested her case. The defendant offered exhibit "S," which was objected to by the plaintiff. It consists of a copy of a complaint and decretal entry in the case of *Petit v. Petit*. In the complaint Hubert Petit alleges facts, sufficient, if true, to constitute a cause of divorce against this plaintiff, but the complaint contains no allegations concerning land, nor any reference to property. It is entitled:

"In the district court of the first judicial district of Oregon Territory, Marion County, September term, 1857." The decretal entry is as follows:

"*Hubert Petit vs. Emerance Petit*, divorce—September 29, 1859.

"Now on this day it appearing that a decree had heretofore been rendered in this cause at the September term thereof, 1857, and that said decree had not been entered, and it further appearing that defendant had been served by publication as required by law—it is ordered that said decree be entered *nunc pro tunc*. It is therefore ordered that the bonds of matrimony heretofore existing between the parties be dissolved, and that said Hubert have the exclusive custody of the two children, the fruit of said marriage, namely: Adelaide and Josephine, and that the north half of

the land claim of said parties, being the part of said claim set apart to said defendant by the surveyor-general, be decreed to and the right and title thereof be vested in the said children, and plaintiff pay costs."

The defendant also offered copies of the records and files, showing all the proceedings in the county court under which the land was sold, from the petition for the appointment of a guardian for the minor children above named filed May 8, 1869, to the deed of the guardian, dated Aug. 26, 1869, inclusive. The plaintiff objected to this evidence upon various grounds, and the decision of the points as to the admissibility of the testimony was reserved.

Sullivan & Thompson and R. Williams, for the plaintiff.

The legal title did not pass from the government until the actual issuing of the patent. (Donation law sec. 8, 13; Pet. 499.)

Nothing less than a deed of the donee, containing covenants, is a good defense in ejectment against her patent. (3 How. 627; 3 John. Ch. 148.)

The complaint in the divorce suit is insufficient. The decree was made without authority and is void. (Comp. L. 1855, p. 538, secs. 7 and 8.)

The court had no power to vest title in the minor children. (*Fitch v. Durand*, U. S. circuit court dist. Oregon; 4 Iowa, 26; 4 Hill, 140.)

The proceedings in the probate court are insufficient. (Code p. 671, sec. 2; 2 Mass 414; 4 Ib. 97; code 880, secs. 6, 10 and 11.)

Rufus Mallory, for the defendant.

UPTON, J., delivered the following opinion:

The plaintiff having introduced a patent from the United States, the burden of proof is on the defendant; and the questions to be determined relate principally to the admissibility and to the effect of the proofs offered by the defendant.

The first point made in the plaintiff's brief, if sustained,

would be a conclusive objection to all the defendant's evidence, and to the facts set up in the answer.

This point is, that the legal title remained in the United States until the patent issued in 1871, and that up to that time neither the plaintiff nor any other person had any interest that could be the subject of a judicial sale.

I am unable to deduce, from the authorities cited, the conclusion that under the donation law the legal title does not pass to the donee by operation of the statute. It has frequently been held that a legislative grant is as effective to pass a title to land, in all respects, as a grant evidenced by a patent. (*Kernan v. Griffith*, 27 Cal. 87.)

The plaintiff's counsel cite *Wilcox v. Jackson* (13 Pet. 499), to sustain the position that, because the donation law provides for issuing a patent, the title does not pass until the patent issues. The circumstance that by the preemption act of 1836, under consideration in that case, patents are to issue in preemption cases, is there referred to as affording an inference or argument, that under the preemption laws "a perfect and consummate title" will not pass except by a patent.

The preemption acts contain no words of present grant, and it is not said in that case, and I think it is not said by that court in any case, that where the statute grants lands by words of present grant, and also provides for issuing a patent at a future time, the title will not pass until the patent issues. On the contrary, statutes that contain words of present grant are expressly excepted from the general rule there stated.

In that case the contest was between the assignee of a preëmptioner, holding a preëmption certificate, and a military officer in possession, "claiming no right of ownership, but as an officer of the United States only, in command of said post, acting under the orders of the secretary of war, his superior officer, and the United States." One of the points decided in the case was that the land was a military reservation, and consequently not subject to preëmption; and a further deduction was that it was not a subject within the jurisdiction of the register of the land-office, and that

for that reason the register's decision and his certificate were void. It was in commenting upon such a case that Judge Barbour used the following language: "With the exception of a few cases, nothing but a patent passes a perfect and consummate title. One class of cases to be excepted is, where an act of Congress grants land, as is sometimes done, in words of present grant. But we need not go into these exceptions. The general rule is what we have stated, and it applies as well to preëmptions as to other purchases of public lands. Thus it will appear by the very act of 1836, which we have been examining, that patents are to issue in preëmption cases. This, then, being the case, and this suit having been in effect against the United States, to hold that the party could recover as against them, would be to hold that a party having an inchoate and imperfect title could recover against the one in whom resided the perfect title." I do not deem this language a decided indication that Judge Barbour thought a provision for the subsequent issuing of a patent would have controlled words of present grant. On the contrary, I think that opinion recognizes what was then a settled doctrine of that court, that an act of Congress, couched in words of present grant, was sufficient to pass the legal title.

I have been unable to see what bearing the case of *Livingston v. Livingston*, (3 John. Ch. 148,) has upon this question.

The remaining case to which the plaintiff refers, is that of *Price v. Sessions* (3 How. 124). Property, real and personal, was devised to a daughter, to remain in the possession of executors until the daughter should arrive at the age of eighteen years; if she should die without heirs before arriving at that age, the property to go to certain other persons. When the daughter was about sixteen years of age, the executor who had the property in possession, married the daughter, and before she arrived at the age of eighteen, a law was passed securing to married women their property, free from the husband's debts. A portion of this property (which seems to have been slaves) was seized on execution for the husband's debt. It was held that the person who had married the devisee was in possession of the property

not as husband but as executor. And that for that reason, that is, because the property had never been delivered to the devisee, the title had never vested in her. It is not a case where she was held not to have the legal title, from the circumstance that a right or estate of her's in the property was liable to be defeated by contingent events. On the contrary, it was decided that for want of delivery the property had never become hers.

From a careful examination of authorities touching this subject, I am clearly of opinion that the first paragraph of section 329 of the code, page 230, is not an innovation, nor in contravention of any law of the United States, and that it is declaratory of the law as it had been previously established by decisions of the federal courts. *

The decision of the merits of this case must turn upon other questions, but a reference to the authorities cited on this point seemed to be due, both on account of the able and earnest manner in which this subject has been pressed upon the attention of the court, and that it may be understood that this point in the plaintiff's case is not an element in the reasoning that leads to the conclusions at which I have arrived in regard to the merits of the case.

The following are some of the other points made by the plaintiff:

1. That the record shown by exhibit marked "S" does not show jurisdiction in the court to grant the divorce.

* This subject is referred to in *Doll v. Meador*, 16 Cal. 295; *Van Valkenburg v. McCloud*, 21 Cal. 330; *Meyerle v. Ash*, 28 Cal. —; and *Owen v. Jackson*, 9 Cal. 322. And it seems to be considered well settled, that the circumstance that the grantee takes a defeasible estate does not prevent the title from passing to him. Nor does the fact that there are conditions subsequent to be performed.

The cases of *Summers v. Dickinson*, 9 Cal. 554; and *Kernan v. Griffith*, 27 Cal. 87, treat of the act of Congress of Sept. 28, 1850, which grants swamp lands, and explicitly declares that "the whole of those swamp and overflowed lands, etc., are hereby granted to said state." These cases decide that the title passed immediately upon the passage of the act. Provision was made in the act for the survey of those lands, and for the issuance of a patent to the state at a future time.

In the United States supreme court, many of the cases, in which patents have been set aside in favor of a prior purchaser or donee, have proceeded on this principle, and a patent has in some cases been held absolutely void, on the ground that the title had previously passed from the United States by act of Congress.

See on this subject, *Fremont v. United States*, 17 How. 566; *Rutherford v. Green's Heirs*, 2 Wheat. 198, 505; *Strother v. Lucas*, 12 Pet. 454; *Green v. Lutz*, 8 Cranch, 244; *Patterson v. Winn*, 11 Wheat. 380; *Polk v. Wendal*, 9 Cranch 87, and 5 Wheat. 301; and *Blunt v. Smith*, 7 Wheat. 249, 273.

See also *Stoddard v. Chamber s*, 2 Wend. 313; *Jackson v. McCall*, 3 Conn. 79.

2. That, in that suit, the complaint does not state facts sufficient to authorize a divorce.

3. It does not state facts that authorized a decree as to the property.

4. It was not in the power of the court in any case to transfer the lands of the wife to the children in fee.

5. The guardian's sale was not regularly made.

I think the first and second points, so far as they relate to granting the divorce, cannot be raised by the plaintiff in the face of the stipulation that the parties were divorced by the decree. The plaintiff claims that her rights in this respect are reserved by the saving clause in the stipulation, and her counsel claims that such was the agreement of the parties, expressed at the time the stipulation was signed. The court cannot look beyond the written stipulation to ascertain the intention of the parties, and I do not think the saving clause sufficient to enable the plaintiff to say at this late day, that the record does not disclose a decree of divorce. The admission debars the plaintiff from denying that there was enough before the court in the first instance, in 1857, to authorize the rendition of the decree, or afterwards in 1859 to justify entering it *nunc pro tunc*. It is true as a general proposition that consent cannot confer jurisdiction; but this is not a case of conferring jurisdiction, it is, in effect, an admission that the court had jurisdiction, and there is not, in my opinion, enough in the record to show affirmatively that the court had not jurisdiction to enter a decree granting a divorce.

I shall therefore take it as conceded that the court had jurisdiction of the persons and of the subject matter of the bonds of matrimony, for the purpose of entering a decree of divorce, and shall proceed to inquire as to the validity of that part of the decree which purports to vest the title of the wife's land in the children. The statute then in force (Comp. L. 1855, p. 540) provides, that "the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through

whom the property was acquired, and to the burdens imposed on it, for the benefit of the children. And all the property * * * *not otherwise* disposed of or regulated by order of the court shall, by such divorce be divested out of the guilty party, and vested in the party at whose instance the divorce was granted."

There is a conflict of authorities upon the question whether a court had power under that statute, in any case, to transfer the property of the parties in fee to the children.

In the case of *Fitch v. Durand*, tried before Judge Deady in the United States circuit court for the district of Oregon, it was held that a decree of similar purport to the one under consideration, did not operate to pass the fee, but only enabled the children to hold the property during their minority. The decision is placed upon the ground that the circuit courts of the Territory had not jurisdiction and power to make such disposition of the real estate of a party. It was there conceded that, "if the act has received a settled construction in the courts of Oregon, it is the duty of this (the U. S. circuit) court to follow such construction."

The decree then under consideration was rendered in the case of *Cline v. Cline*, in the circuit court for Multnomah county, in 1862. On the argument in *Fitch v. Durand*, counsel cited five other cases in which, between September 1855 and November 1860, the circuit courts in the same district had rendered decrees purporting to transfer real estate in fee to the children of the parties. No such case was cited from any other district, and the circumstance that the act had been so construed in only one district, was referred to as one reason for considering its construction still an open question.

The case now under consideration, was tried in another district, but the attention of the court was not called to it. It was said in the case of *Fitch v. Durand*, the act "contained no provisions for an appeal from the inferior courts in which the original jurisdiction was vested, to the supreme court, and therefore its provisions never came before the latter court, and were never considered or expounded by it." * * * "In the other judicial districts,

no such construction appears ever to have been given to the act, and only in these comparatively few instances in a period of nine years, in that one. If this state of things is any evidence of a settled construction of the statute, by the courts of Oregon, it is against the one claimed by the defendant. I conclude, then, that the question is unsettled, and that this court must construe the act for itself." And it was there held that, "the decision of the circuit court given in the suit for divorce, so far as it provides that the premises in controversy should be held by, or for the use of the minor children * * * beyond the time when they should become of age respectively, is simply void."

As no such provision of statute has been in force since 1863, and as it is quite possible this is the last time its construction will be questioned in the courts of this state, I am disposed to rest the decision of the case solely upon what appears to me a much less debatable ground.

It will be observed that the complaint in the suit for divorce makes no allusion to the property or to the pecuniary affairs of the parties, or of either of them.

The recitals in the decretal order, purporting to justify the entry of the decree *nunc pro tunc*, do not show that anything was determined concerning the property in the first instance, by the court that heard the cause. And there is enough appearing on the face of the record to show that the judge who made the order *nunc pro tunc*, was not the judge before whom the cause was tried. The clerk has certified that exhibit "S" is a copy of the whole of the record; we consequently have before us the judgment roll in the suit for divorce.

It is necessary, in order to sustain the defendant's positions, to assume that the circuit court could render a valid and binding decree in regard to a subject matter that is not mentioned in the pleadings; and that a judge could at a subsequent term, by an order *nunc pro tunc*, enter a decree making a transfer, from the wife to the children, of a particular parcel of land that was not previously described or mentioned in the pleadings or in the record.

Every reasonable intendment will be invoked in support

of the judgment or decree of a court of general jurisdiction. And courts often exercise powers that are incidental to the principal subject of the litigation. But such incidental power is not applied to a subject matter that is wholly extraneous and not mentioned in the pleadings. It always operates upon some matter that is regularly brought before the Court:

For example, in suits to remove clouds from title, or in bills of peace, where the principal point in the litigation is to establish and perpetuate a right, the court will sometimes afford incidental relief by reforming or canceling a written instrument, or by compelling its production and delivery, even when such relief is not the principal object of the suit; but the facts in relation to such instrument must be laid before the court by the pleadings. If the instrument was merely produced in evidence, and not mentioned in the pleadings, its reformation or cancelation would not be decreed. So in forcible entry and detainer, the court will afford incidental relief by granting restitution of the premises, but the premises are designated in the pleadings. So in the foreclosure of a lien, a writ of assistance is sometimes issued in favor of the purchaser, but this would not be done if the record contained no designation of the premises.

I am unable to call to mind any class of cases where courts have, by virtue of such incidental power, exercised judicial discretion to make a special and final disposition of a parcel of real estate that is not referred to in the pleadings or prior proceedings.

Under the statute above cited the decree in a suit for divorce may possibly, in certain cases, by operation of law, affect the title to property that is "not disposed of or regulated by order of the court," even where the property is not mentioned in the pleadings. But that circumstance does not add to the incidental power of the court, and it is not material to the inquiry here whether property not mentioned in the pleadings would be thus affected, for it is not claimed that this property has been transferred by mere operation of law. The question is whether it has been disposed of by the special adjudication set forth in the decree.

The object in requiring facts to be stated in the pleadings is threefold: that the facts may be brought before the court, whose office it is to apply the law to the facts; to apprise the opposite party what is intended to be proved; and to lay a foundation for recording that which shall be adjudged concerning the facts alleged. Neither party has the right to introduce any proofs except such as support or contradict something that is alleged in the pleadings. How, then, can the court exercise a discretion, having regard to the property of the parties, "the condition in which they will be left by such divorce, and to the party through whom the property was acquired," if the pleadings contain no reference to the subject. There are but two possible modes for such a proceeding when there are no allegations in regard to property, the judge must exercise the discretion mentioned in the statute without any knowledge of the facts, or he must act upon knowledge obtained outside of any legitimate proceeding connected with the trial of the cause.

I cannot doubt that, under that statute, it was contemplated that the court would act upon proofs, or upon facts taken as confessed, in attempting to make special disposition of real estate; and that special disposition of the property of the parties, although incidental to the granting or refusing the divorce, is within the provisions of the code requiring the complaint to state facts.

It is true that after the decree has become final, any colorable statement of the essential facts would be sufficient to prevent the decree from being held void: but the instances in which the effect of omissions, or defective statements of facts, are avoided by presumptions in favor of the jurisdiction, are where the pleadings have contained statements sufficiently general to comprehend the requisite facts by fair intendment.

If the issue joined be such as necessarily required, on the trial, proofs of facts imperfectly stated or omitted, without which proof the decision of the cause would not have been made, the imperfection or the omission will not be fatal. But this is the case only when a necessary intendment must arise, not merely from the decision, but from

the united effect of the decision and the issue upon which the decision was given, that the imperfectly stated or the omitted facts must have been proven on the trial. If there is nothing in the facts stated in the pleadings that would render such proofs necessary, no such intendment in favor of the decision will arise to aid or supply the defect. (*Garner v. Marshall*, 9 Cal. 268; *Hentsch v. Porter*, 10 Cal. 555.)

No such intendment arises to excuse such an omission in case of a judgment by default, for the default admits only such facts as are actually alleged, and there is no necessity for the plaintiff proving anything further. (1 Chitty, Pl. 673.)

By the common law, as well as by the code, the defect that the complaint fails to state facts constituting a cause of action, was not waived by failing to demur, or to answer; and this is upon the principle that courts will not, and can not, adjudicate upon that which is not brought before them.

In this case it is virtually admitted by the stipulation that the court had jurisdiction of the subject matter of the alleged divorce, and of the persons of the plaintiff and defendant. The question is whether there is any reasonable intendment or presumption that can be indulged, that the subject matter of the defendant's property was legally placed before the court for adjudication.

It is a case where the defendant might have appeared and filed an answer, describing her property. . But if she had answered, the recital that she had been served by process by publication would have been unnecessary, and that recital, omitting all mention of an answer, certainly does not indicate that an answer was filed. This matter, however, is placed beyond conjecture; the clerk certifies that exhibit "S" is a copy of the whole record, and it is shown by inspection that the complaint is the only pleading. It is not a case calling for presumptions as to what pleadings were filed, for all the facts in relation to these matters are fully disclosed. The facts present this question: Could a judge who was trying a divorce suit, without having before him, judicially, any allegations or any knowledge as to whether either party owned any property, make a valid

decree specially transferring a specific parcel of land in a direction it would not pass by operation of law?

Aside from the general principle upon which the law universally requires pleadings upon which to predicate a judgment or decree, such could not have been the legislative intent in enacting this statute, because the statute requires the court to investigate and be informed in regard to the pecuniary condition of the parties, and as to the party through whom the property was acquired, before attempting to make an equitable disposition of the property; and it makes special provision concerning such property as shall not be disposed of or regulated by order of the court.

In the divorce suit there was no foundation laid for introducing evidence on these points, and there are no admissions, direct or by implication, concerning them.

I think there is not enough in the judgment roll in the divorce suit to operate as a foundation of a title to real estate, and that judgment should be rendered in favor of the plaintiff.*

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1872.

CAROLINE J. KING v. C. W. HIGGINS.

SUIT TO REMOVE CLOUD.—In a suit brought to remove a cloud from title to real estate, it is necessary to state facts from which the court can properly draw the conclusion that the claim made by the defendant is a cloud upon the plaintiff's title.

IDEM.—WHEN SUIT WILL BE ENTERTAINED.—It is not every case where an instrument in the hands of another person is calculated to induce the belief that the plaintiff's title is invalid, that such instrument is the foundation of a suit. Nor is it, in all cases, necessary for the plaintiff to wait until he has been disturbed by legal proceedings, nor to first establish his title by a judgment at law.

IDEM.—One may maintain a suit to remove a cloud, notwithstanding it appears from his complaint that he has a legal title. The exception is, that if it appears on the face of the papers under which the defendant claims, that the legal title is in the plaintiff, the suit cannot be maintained.

* This action was commenced in Marion County, and the venue changed to Multnomah County, Judge Bonham having formerly been counsel in the case.

JUDGMENTS BY CONFESSION.—Under a statute relating to judgments by confession, which requires the plaintiff to file a sworn statement, and enacts that the clerk shall indorse the judgment upon the statement and enter it in the judgment book, the two entries ought to be deemed to have the force of duplicate copies, each having the effect of an original.

IDEM.—CLERICAL ERROR.—Where the clerk indorsed the judgment on the statement, but by mistake omitted to enter it in the judgment book, it was held that the omission would not invalidate the judgment, except in favor of one who has been misled by the omission.

COMPLAINT.—In a suit to remove a cloud, where the complaint admits that the clerk failed to enter the judgment in the judgment book, the complaint should state what acts were done by the parties and by the clerk in relation to confessing and entering the judgment.

This is a suit to remove an alleged cloud from the plaintiff's title. The plaintiff avers that she is owner and in possession of the parcel of land known as lot 6, in block 221, in the city of Portland. She sets out a series of conveyances, from which it appears that both the plaintiff and defendant claim title from the United States through Wm. M. King, now deceased. The defendant claims title under a sale made by the administrator of the estate of Wm. M. King, who departed this life on or about the eighth day of November, 1869.

The plaintiff sets out her mode of acquiring title from said Wm. M. King, as follows:

“On the sixth day of August, 1855, said Wm. M. King confessed a judgment in favor of Thomas J. Carter, in the district court of the territory of Oregon for the county of Multnomah, for \$1,383. And on the first day of April, 1856, a writ of execution upon said confession of judgment was duly sued out of said territorial district court, and placed in the hands of William McMillen, the then sheriff, for service.” The complaint goes on to show that this lot, with other property, was sold by said sheriff on the fourteenth day of May, 1856, to satisfy the execution. That Carter bought the property at \$1,000.52. That the sheriff executed and delivered to said Carter a deed in pursuance of the sale. That the deed was approved by the judge of said court, and duly recorded. And that afterward, on the fourth of February, 1857, said Carter by deed conveyed the premises to the plaintiff; since which time plaintiff has

continued in possession. The plaintiff also alleges, "That through inadvertence and mistake, the clerk of said territorial district court omitted to enter said confession of judgment in the judgment book," and alleges "that said confession of judgment was duly entered in the lien docket of said court," stating the mode of entry.

The plaintiff's complaint also alleges "that the judgment roll of said confession of judgment remained to be seen in the proper officer's custody for a long time after the sale of May 11, 1856, and until after the approval of the sheriff's deed by the court, January 2, 1857, but has since been lost or abstracted from its proper custodian, and plaintiff is unable to tell the exact date of its loss or abstraction."

The complaint, after setting out the sale of said lot by the administrators of King's estate to the defendant, avers that the defendant bought with notice, and that the administrator's deed to the defendant is a cloud upon plaintiff's title.

The defendant demurs to the complaint, on the ground that it does not state facts sufficient to constitute a cause of suit.

Chapman & Goodsell, for the plaintiff.

Shattuck & Killin, for the defendant.

UPTON, J., delivered the following opinion:

This is a suit by a plaintiff in possession, and if sustained, it must be as a suit to remove a cloud from the plaintiff's title. Much has been said on the subject of the power of the court to amend the judgment alleged to have been confessed by the late William M. King in favor of T. J. Carter. But it is not necessary to advert to that subject further than to say, that this cannot be considered a bill for that purpose. The complaint does not sufficiently describe that judgment to enable the court to make an amendment; it does not bring all the interested parties before the court; and it does not purport to set out the cause of action upon which the confession was made.

The allegations are insufficient to warrant an amend-

ment of that judgment in this proceeding, aside from any question as to the general power of the court.

Section 500 of the code provides that "any person in possession, by himself or his tenant, of real property, may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest."

It is necessary to consider the requisites of a complaint in this class of cases, and particularly what must be alleged in respect to the defendant's claim. It is not every idle assertion, made by one who has neither title nor color of title that will suffice to invoke the power of a court of equity to the relief of the plaintiff. It has been claimed that the enactment of this section has so revolutionized the practice in this class of cases, that a statement of the defendant's claim in the language of the statute is sufficient to constitute a case in equity; and the case of *Curtis v. Sutter* (15 Cal. 259) is referred to as supporting that position. The point decided in that case is, that an injunction was properly dissolved upon the coming in of an answer, which denied the title of the plaintiff and set up paramount title in the defendant. The opinion is expressed that, under the statute of that state, "it is unnecessary for the plaintiff to delay seeking the equitable interposition of the court until he has been disturbed in his possession by the institution of a suit against him, and until judgment in such suit has passed in his favor.

Chief Justice Field in that case intimates that a party was formerly thus restricted, and that the restriction was removed by the enactment of that section. If it is true that such restriction was universal before the enactment of that section, there certainly are grounds for the statement that the section "enlarges the class of cases in which equitable relief could formerly be sought in quieting title." It may be questioned, however, whether that restriction was universal before that enactment. (Story Eq. Jr. ss. 694, 700; *Petit v. Shepherd*, 5 Paige, 492.) Without pursuing the subject of what the law was before the enactment, it is safe to say, it cannot be fairly inferred from the

opinion expressed in the case of *Curtis v. Sutter*, that it is not now necessary to state facts from which the court can properly draw the conclusion that the claim is a cloud on the plaintiff's title, or, in other words, from which the court can infer that it works some injury that entitles the plaintiff to equitable relief. The complaint then under consideration stated the nature of the defendants' claim, and charged that the defendants were surveying and mapping the lands and offering them for sale. Section 500, above quoted, is part of the same act which requires in the complaint a statement of the facts that constitute the cause of suit; and it is not to be supposed that the object of this section was to establish a new and exceptional rule of pleading applicable only to this class of cases. It is not in every case where an instrument in the hands of another person is calculated to induce the belief that the plaintiff's title is invalid, that it is the foundation of a suit. (*Scott v. Onderdonk*, 4 Kern. 8.)

The defendant is right, I think, in his position that if the plaintiff does not show a valid judgment against Wm. M. King, she does not by her complaint show any right in herself, or any sufficient cause of suit. But the defendant states his case too strongly when he says: "If the supposed judgment was complete, the plaintiff has title, and no grounds for equitable relief can exist." The rule on that subject goes no further than this: if the legal title is in the plaintiff, and that fact appears on the face of the deed, instrument, or chain of title under which the defendant claims, or if it appear on the face of such deed, instrument, or chain of title that the defendants' claim is without foundation, the suit will be dismissed. (*Heywood v. City of Buffalo*, 4 Kern. 534; *Ward v. Dewy*, 16 N. Y. 519; *Vandorn v. Mayo*, 9 Paige, 388; *Story Eq. Jr. sec. 700*.)

It is no objection to the claim here set up that the plaintiff has a legal title, if it also appears that the claim made by the defendant and the chain of title upon which it is based present proof *prima facie* of the legal title in the defendant, and presents nothing on the face of the title papers to the contrary. Or if it is shown that there is an obstacle to the plaintiff asserting her title in a court of law, which ought to be removed.

The proceeding, in the matter of the confession of judgment, was under the practice act passed January 7, 1854. (Compiled L. 1855, p. 117.) By that act, the clerk was required to keep a book for the entry of judgments, to be called "The Judgment Book." And for the confession of judgment without action the requirements were as follows:

"A statement in writing shall be made and signed by the defendant and verified by his oath to the following effect."

"It shall state concisely the facts out of which it [the judgment] arose, and shall show that the sum confessed is justly due, or to become due." "The statement shall be filed with the clerk of the district court in which the judgment is to be entered, who shall indorse upon it and enter in the judgment book a judgment for the amount confessed, with five dollars cost. The statement and affidavit with the judgment indorsed, shall thereupon become the judgment roll."

In judgments other than by confession, under that act, the judgment roll contained a copy of the judgment, the original entry being in the judgment book.

The defendant objects that the complaint should state the acts done, in the attempted confession of judgment; and it will be necessary to notice that objection hereafter; but the principal argument, on the hearing of the demurrer, was addressed to the question whether a valid sale could be made without an entry in the judgment book.

The statute requires the clerk to indorse the judgment on the statement filed, and enter it in the judgment book. The indorsement and the entry must be considered simultaneous acts, or at least, it cannot be contended that the entry of the judgment in the book need precede the writing of it on the back of the statement. The two entries may be considered duplicates; at least, the indorsement on the statement is not to be a mere copy, and it must be considered an original entry, under the language of the act. Doubtless the two entries ought to be deemed to have the force of duplicate copies, each having the full effect of an original entry. If this is a proper construction of that statute, when the clerk had made one of these entries, the

terms of the judgment were expressed, and I cannot think the judgment should be held void because of an omission, by mistake, to make the additional entry in the book, except in favor of one who has been misled by the omission. Equity considers that as done which ought to have been done. It is the act of entry that distinguishes the present case from *Blydenburgh v. Northrop* (13 How. Pr. 289). There the clerk had made no entry of judgment. In *Van Beck v. Sherman* (13 Id. 472), the judgment was held void for defects in the statement. Nothing of that kind appears here. The case of *Shottenkirk v. Wheeler* (3 Johns. Ch. 275) is to the effect that equity will not set aside or disregard a judgment for errors, or for departures from the prescribed mode, when the objection would not be sufficient in a court of law. I do not think it sustains the converse of this proposition, that equity would never sustain a proceeding, defective through mistake, unless the same could be supported at law.

The case of *Neale v. Berryhill* (4 How. Pr. 16), was under a statute exactly similar in this particular to ours above quoted; and the mistake is the same that is alleged in this case, except that the clerk omitted in that case to endorse the judgment on the statement, but did enter it in the judgment book. After other parties had taken judgment against the same defendant, the court permitted the endorsement to be made *nunc pro tunc*. This, after third parties had obtained judgments, could not be done on principles of justice, no matter how broad the statute of amendments, unless upon the idea that the proceeding had become a judgment before the rights of the third party intervened. I do not, however, deem that case, nor any of the cases cited, in which leave to amend was the point before the court, as of great weight on this subject, for the reason that this complaint ought not to be considered as an application to amend. It is said in *Gray v. Palmer* (28 Cal. 416), and in *Genella v. Relyea* (32 Cal. 159), that the entry of judgment in the judgment book is a mere ministerial duty of the clerk. The point in those cases relates to the time when a judgment shall be deemed rendered. In each

case a judgment had been announced, and "an order for judgment" entered in the minutes. And in each case it was held that the day of rendering judgment was that on which the judgment was announced and the order entered, and not a subsequent day on which the entry was made in the judgment book. Much stress was also placed on the case of *Lee v. Figg* (37 Cal. 328). The syllabus of that case is to the effect that "a judgment for money, by confession, upon a statement which does not sufficiently state the facts out of which the indebtedness arose," cannot be collaterally attacked. Chief Justice Sawyer, in the opinion filed, observes the "court had jurisdiction of the subject matter and the parties," and that "the judgment was entered in *open court* and regularly signed by the judge, as was the practice under the code of 1850." The case being a proceeding before a tribunal of general jurisdiction, and in open court, is not in point, under a statute which provides for entering a judgment by the clerk, and where the court has no jurisdiction but that derived from the statute and the acts of the parties. When the parties come before the clerk in the manner prescribed by statute, and he commences the performance of his duties in the manner prescribed, he obtains jurisdiction, and if he proceed regularly, so far that rights vest, the judgment cannot be disregarded for defects that do not raise a question of jurisdiction. I am of opinion that if it is shown that all the necessary steps, up to and including the indorsement on the statement, were regularly taken in good faith, that the failure to make the entry in the judgment book, will not of itself render the proceeding void.

Conceding that the statement was regularly made and filed, and the judgment indorsed upon it, the question arises whether the failure of the clerk to make the entry in the judgment book, the loss of the judgment roll and the subsequent conveyance by the administrator of the judgment debtor's estate, are sufficient grounds for equitable relief. I am not prepared to assume jurisdiction on a supposition that the alleged judgment roll, if in existence, could not be read in an action at law, notwithstanding the failure to

make the entry in the judgment book; nor on the ground that in case of its loss its contents cannot be established by parol in a court of law, as well as in equity. But if the complaint had set forth fully what acts were done, at the time of the alleged confession of judgment, showing that nothing essential was omitted except making the entry in the judgment book, I think these two causes combined with that of the sale under the order of the Probate Court, constituted ground for quitable relief, and are sufficient grounds for permitting an amendment of the complaint, although the demurrer must be sustained on another ground. The complaint admits that at the time of the rendition of the judgment some of the acts contemplated by the statute in relation to the confession of judgment were omitted; and the complaint is too vague in its statements as to what steps were taken in the proceeding. The demurrer will be sustained that the plaintiff may so amend the complaint as to state what acts were done in the attempt to obtain judgment.

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF OREGON.

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GEORGE A. PEASE, ADMINISTRATOR, RESPONDENT, v. JAMES
K. KELLY AND OTHERS, APPELLANTS.

VENDOR'S LIEN.—A mortgage is a more certain security than a vendor's lien, and under our laws, the taking of a mortgage for the purchase money, is a waiver of the vendor's lien.

IDEM.—A vendor's lien exists in case there is no higher security.

IDEM.—Both the lien of a mortgage and a vendor's lien cannot exist at the same time.

THE complaint in substance alleges that Robert Moore in his lifetime, in 1852, sold and conveyed by deed to Daniel H. Ferguson, a tract of land, and water privilege at the Willamette Falls, for fifty thousand dollars; of which sum forty-five thousand remained unpaid, and a note for that amount was taken by Moore, secured by mortgage on the premises. In 1853, Ferguson sold the premises subject to the mortgage, to the Willamette Falls Transportation Company, who made extensive improvements thereon, and failed; leaving their work subject to the liens of mechanics and material men, in addition to the incumbrance of this mort-

3	417
7	221
11	98
11	119
14	274
14	276
14	276
4 th	602
4 th	616
13 th	419
13 th	420
3	417
220	122

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gage. In 1854, Moore assigned this note and mortgage, by written assignment to O. C. Pratt, to secure the payment of a sum of money, loaned by Pratt to Moore. In 1855, Pratt assigned by written assignment to Leander Holmes, and, at the same time, Moore executed a second assignment of the note and mortgage to Holmes, but, at the same time, and as a part of the same transaction, took back an agreement from Holmes to pay him (Moore) certain sums of money, and especially \$9000, which sums were to be secured to Moore by a new mortgage on the land in question, so soon as Holmes should get the legal title, and discharge the premises from certain mechanics' liens, which were pending against the property, amounting to about \$9,000.

J. K. Kelly and Mitchell & Dolph, for Appellants.

A vendor's lien, recognized by the courts of some of the states, and rejected by others, is a dangerous principle, and one opposed to the prevailing policy of this country, which discourages secret liens. (*Bayley v. Greenleaf*, 7 Wheaton, 78; 5 Curtis, 216; 1 Lead. Cases in Equity, 363; *Simpson v. Munou*, 3 Kansas, 182.)

Taking an express security on the land itself for the whole amount unpaid, as by a mortgage, will merge the implied lien. (*Brown v. Gilman*, 4 Wheat. 255; 27 Ill. 422; *Fish v. Howland*, 1 Paige, 30, 31; and others.)

A vendor's lien will not be enforced against a *bona fide* purchaser without notice. (7 Wheaton, 50; 1 Leading Cases in Eq. 371.)

Logan & Shattuck, J. B. Upton and Bronaugh & Bybee, for respondent.

Even if it be held that Moore's assignment of the \$45,000 note and mortgage to Holmes was full, so as to divest Moore at law of all interest in and control over those writings, yet, if \$9,000 of the *purchase money* of the land, intended to be evidenced and secured by those instruments, remains actually due to Moore, under the agreement be-

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tween him and Holmes, at the time of assigning the note and mortgage; and if the defendants had notice, actual or constructive, of that fact at the time they became the purchasers of the land, then Moore's estate still retains in equity a vendor's lien against the land for said \$9,000 debt, unless Moore did some act amounting to a waiver of such lien. (4 Kent, 152; 1 John. Ch. R. 308; 5 Ohio, 35; 18 Ark. 142; 1 Paige, 23 and numerous other cases cited.)

The taking of a *distinct* security for the purchase money, is a waiver of this lien, but the taking of a mortgage on the land is not. (17 Ohio 500.)

The rule *caveat emptor* applies to Kelly's purchase at sheriff's sale, of the interest of the Willamette Falls M. & T. Co. in the land. (2 Kent, 78; 16 Cal. 559; 9 Wheat. 616, 648, and other cases.)¹

BOISE, J. In this case, Moore took a note and security on the land for the purchase money. A mortgage is a more certain and definite security than a vendor's lien. The lien exists if there is no higher security, but we think that the taking of a mortgage, which is an open and public lien, is a waiver of the vendor's lien, and we think that both liens cannot exist at the same time, and such seems to be the well established doctrine of the cases. (*Brown v. Gilman*, 4 Wheat. 255; *Fish v. Howland*, 1 Paige, 30; *Hunt v. Waterman*, 12 Cal. 30; *Camden v. Vail*, 23 Cal. 633; 1st Leading cases in Equity, 365; 27 Ill. 422.)

This view of the matter necessarily disposes of all the questions in the case, and it will not be necessary in disposing of the case, to consider the numerous other points which were discussed on the argument.

The judgment will be reversed.

1. The briefs in this case are very full, and embrace very many points of interest to the bar. Only such points are referred to here as belong to the views taken by the court.—RSP.

Dearborn v. Patton.

R. H. DEARBORN, RESPONDENT, v. JAMES J. PATTON
AND OTHERS, APPELLANTS.

Appeal from Douglass County.

LIEN OF JUDGMENT.—A transcript of a judgment in a justice's court, was filed in circuit court, in 1861, and became a lien on real estate for five years, under the law of 1855. In 1862, the statute made it a lien as long as an execution might issue, repealing the law of 1855, and in 1864 it was enacted that a lien should extend to ten years, and if no execution had issued thereon, it should then expire, and process was provided by which execution might issue after ten years, and that would continue the lien.

The section 3 of the repealing act, p. 944 of the code, passed 1864, provides that "no rights vested or liabilities incurred at that time, shall be lost or discharged." *Held*, under these statutes, that the judgment lien is an incident to a judgment, and is a liability incurred, and was saved from the effect of a repealing statute.

PARTNERSHIP.—Effect of docketing a judgment in the partnership name.

THIS suit was brought by R. H. Dearborn, administrator of the estate of R. E. Stratton, deceased, to foreclose a mortgage on land in Douglas County, given by James Patton to said Stratton, and dated on the twenty-fourth of February, 1862. John Smith and D. C. Underwood were made parties, defendant, because they were judgment creditors of said Patton. The appellant Smith, in a separate answer by him filed, alleges that in 1861, S. Marks & Co., obtained a judgment against said Patton in a justice's court, in Douglass County, for \$60.50, with interest, at two per cent. per month, and on the fifth day of July, 1861, a certified transcript of such judgment was filed in the office of the clerk of Douglas County, and such judgment then and there docketed in the judgment lien docket of the circuit court of said county, whereby said judgment became a lien on said land, and the appellant claims that the same lien still exists. The court below held that the judgment set up in the answer, was not a lien upon the mortgaged premises.

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Watson & Willis, for appellants.

A judgment rendered by a justice of the peace, when filed and docketed in the circuit court, shall have the same lien as a judgment in the circuit court. (Stat. 1855, p. 304, secs. 78, 79; Code, p. 593, secs. 50, 51.)

At the time of docketing this judgment, the law continued the lien for five years.

In 1862, this law was repealed, and the general laws in sec. 267, fixed the same time for the continuance of a lien.

In October, 1864, before the expiration of five years of the lien of this judgment, sec. 267 was amended, extending the lien to ten years. (Code, p. 206; *Daily v. Burk*, 28 Ala. 330; ——— v. *Tullis*, 2 Minn. 572; *Wood v. Williams*, 1 Greene, Iowa, 272-4-5.)

Where one statute is repealed and another enacted at the same time, the second statute continues the first. (*Lisbon v. Clark*, 18 N. H. 234; *Wright v. Oakly*, 5 Met. 400; *Fulleton v. Spring*, 3 Wis. 667.)

Williams & Willis, for respondent.

The repeal of the law of 1855, in 1862, destroys Smith's lien (2 Ohio, S. R. 36; 3 Parsons on contracts, 275; 1 Peters, 443), unless preserved in the saving clause. (Code, p. 944, sec. 3, p. 497, sec. 9.) The law creating judgment liens is not retrospective, nor does it continue liens of judgments prior to its passage. (Code, p. 206, sec. 4.)

If there was a lien on the property, it was under the old statute of 1855, and expired by limitation in five years, and this time elapsed before this suit was commenced.

The judgment was not docketed as the law requires.

The judgment is not so plead as to constitute a defense. (Code, p. 160, sec. 65; 36 Penn. 458.)

The appellant's lien is statutory, and must be clearly within the provisions of the act. (1 Wash. on real property, 477, 478; 7 Conn. 556.)

The lien was lost by the judgment being taken into the District Court before an execution had been issued thereon.

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The law in force at the time of the making of a contract, enters into and makes a part of the contract. (16 Johns, 251; 16 Mass. 13; 31 Ill. 83.)

BOISE, C. J. The statute of 1855, p. 304, secs. 78, 79, provides that judgments in justices' courts, when a transcript was filed in the circuit court, and the judgment docketed in the judgment lien docket, should become a lien on the real estate of the judgment debtor. This judgment in question therefore became a lien on the land in question, on the same being docketed July 5th, 1861, which lien would have continued for five years from that time, had that statute remained in force until the same was superseded by our present statute (p. 206, secs. 266, 267), and it is claimed that the statute of 1855 was repealed by the statute of 1864 (Code, p. 944, sec. 3), and the lien thereby destroyed. Section three provides that no rights vested or liabilities incurred when the repealing act takes effect shall be thereby lost or destroyed. We hold that a judgment lien on real estate is an incident to the judgment, and is a liability incurred, and that the lien was therefore saved from the effect of the repealing statute.

The next question is, did our present statute, providing for judgment liens, extend liens created under the statute of 1855, which existed at the time the present statute took effect?

The present statute provides that liens of this nature shall continue while an execution may issue on the judgment. (Code, sec. 266.) Section 292, p. 216 of code, provides, that whenever, after the entry of judgment, a period of five years shall elapse without an execution being issued on such judgment, thereafter an execution shall not issue except as provided, which requires a proceeding in court to revive the judgment for that purpose.

Section 267, p. 206, provides, that "whenever, after the entry of judgment, a period of ten years shall elapse without an execution being issued on such judgment, the lien thereof shall expire." These provisions—1st, that the lien shall continue while an execution may issue; 2d, that no

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execution shall issue after the lapse of five years, without a legal proceeding to revive the judgment; and, 3d, that when ten years shall elapse without an execution being issued on the judgment, the lien shall expire—do not appear to be consistent with each other, and, I confess, leave the question, as to when a judgment lien expires, in confusion. But this court, in the case of *Murch v. Moore* (2 Oregon R. 189), have construed this statute of 1864, sec. 267, p. 206, and held that that section extended judgment liens, not having expired at the time the statute took effect, from five to ten years, and we recognize this case as authority here.

The judgment lien is created by statute, and, without any provision limiting it as to the time it should run without being foreclosed, it would run indefinitely. It was first limited to five years, and when that limit was extended, and the lien preserved, continued to run and bind the land to the time limited by the second statute, which by the construction given to section 267, would be ten years from the date of the judgment, when no execution is issued; and when execution is issued, then during the time the judgment is kept alive, so that an execution may issue thereon; and every issue of an execution, it would seem, extends the lien for five years.

There is another point made by the respondents in this case: it is insisted that the judgment was not properly docketed, it being in the name of *S. Marks & Co. v. James Patton et al.*, not setting out the names of the partners constituting the firm of S. Marks & Co.; and it is claimed that such an entry in the docket is not legal notice to subsequent purchasers. In this case the name of the judgment debtor is correctly described, and it is his land that is to be affected by the lien. The record, therefore, is not uncertain as to the land affected. It shows that the land of Patton is subject to a lien by a judgment to S. Marks & Co., and I think the estate affected by the lien is as clearly pointed out as though the individual names of the plaintiffs had been spread on the record of the docket entry.

Judgment is therefore modified.

 McCalla v. Multnomah County.

ROBERT McCALLA, RESPONDENT, v. MULTNOMAH COUNTY,
APPELLANT.

Appeal from Multnomah County.

COUNTY LIABLE FOR NEGLIGENCE OF ROAD SUPERVISORS.—Road supervisors are agents for the county, and the county is liable for a supervisor's negligence in not repairing a bridge.

BRIDGE.—The county is responsible, under section 347 of the code, for negligence in allowing a bridge to be out of repair, whereby injury accrues to any person traveling over it, who is himself not guilty of negligence; and negligence is a question for the jury.

THE plaintiff in this action seeks to recover damages received by the minor son of the plaintiff, caused by said minor having fallen through a bridge on a county road, within said county of Multnomah. The complaint alleges that the said bridge belonged to the county, and that the same was out of repair through the negligence of the county, and in consequence of such negligence said child became injured. The defendant moved for a nonsuit, on the ground that under our state laws there is no liability attaching to a county for injuries sustained by individuals from defects in roads and bridges. The court below overruled said motion, and the case was tried by a jury and damages recovered.

Kelly & Reed and Page & Thayer, for the appellants.

By common law counties were not liable. (Ang. on Highways, 286, *et seq.*)

Liability under statute cannot be extended beyond statute measure. (17 Conn. 475; 8 Met. 388; 7 Cush. 490.)

No statute in Oregon requiring counties to keep bridges in repair. (Code pp. 866–31.)

Such duties belong to particular officers. (11 N. Y. 392; 21 Cal. 113, *etc.*)

No notice given to supervisor of defect in bridge.

Caples & Moreland, for the respondent.

County bound to repair bridges. (Code p. 366, sec. 870; 3 Hill, 612; 5 Selden, 163.)

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A duty to repair involves an obligation to pay damages resulting from a neglect to repair. (16 N. Y. 158; 7 Conn. 86; 9 Iowa, 227; 39 Barb. 329; 13 Iowa, 181; Ang. on Highways, secs. 290-300.)

BOISE, C. J. The question presented to this court for determination is: Are the counties in this state liable for injuries to persons occurring by reason of bridges on county roads being out of repair? This question must depend on the construction of our statutes on this subject, "that all county roads shall be under the supervision of the county court of the county in which such road is situated." It is the duty of the county court to appoint supervisors in each road district; and the county court also has power to remove supervisors on failure to perform their duties, and they are made responsible to the court, and are the agents of the county. (See Statutes, 863, sec. 19.) On failure to perform his duty, a supervisor is liable to an action by the county for the use of the county; and as being an agent of the county, and acting under its authority and direction. We think the county would be liable for his negligence in not repairing a bridge, provided there is any liability in such cases. It is contended, that at common law there would be no such liability; and, that a person injured by a bridge out of repair, has no remedy, however clearly it be shown to have been occasioned by the negligence of the road supervisor. This may be true at common law, but the statute of this state (page 235, sec. 347) provides: "An action may be maintained against a county, or other of the public corporations mentioned in section 346, either upon a contract made by such county, or other public corporation in its corporate character, and within the scope of its authority, or for an *injury to the rights* of the plaintiff, arising from some act or omission of such county, or other public corporation."

We think that when the county erects a bridge on a public highway, to be used for travel, they are responsible under this statute for negligence in allowing the same to be

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out of repair, whereby injury accrues to any person traveling over it, who is himself not guilty of negligence. What would be negligence in the county, or in the party injured, are questions for a jury, to be determined in each particular case, and in this case they were found favorably to the plaintiff.

WALTER MOFFITT AND A. MEIER, RESPONDENTS, v.
STEPHEN COFFIN, APPELLANT.

Appeal from Multnomah County.

COVENANT, CONSTRUCTION OF.—A covenant in deed was in these words: "The said party of the first part, for them and their heirs, the said premises, in the quiet and peaceful possession of the said party of the second part, their heirs and assigns, against the said party of the first part and their heirs, lawfully claiming, or to claim the same, shall and will warrant, and by these presents forever defend," *Held*, not to be a covenant for quiet enjoyment, and that it does not warrant against assigns of the grantor.

IDEM.—An express covenant cannot be construed so as to extend its obligations by implication.

THIS action was brought by Walter Moffitt and A. Meier, plaintiffs, in the circuit court of Multnomah County, against Stephen Coffin to recover damages for the alleged breach of a covenant of warranty, made by Coffin to the assignors of plaintiffs, for certain real estate in the city of Portland, in a deed by Coffin and wife, from which real estate, consisting of town lots, said plaintiffs were evicted by a person claiming the title from Coffin prior in date to the title of plaintiffs. The warranty is as follows: "And the said party of the first part, for them and their heirs, the said premises in the quiet and peaceful possession of the said party of the second part, their heirs and assigns, against the said party of the first part and their heirs, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend." The court below overruled a demurrer to complaint, and

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upon motion struck out the defendant's answer, to which exception was taken, and from the judgment for the plaintiffs, defendant has appealed.

O. P. Mason, for the appellant.

An express covenant takes away all implied covenants. (7 Mass. 68; 8 Mass. 201; 11 Johns. 122.)

An express covenant of warranty against the defendant and his heirs cannot be construed so as to extend to any other persons than those named. (2 Bac. Ab. 576, 677, 582, 584.)

Damages can only be recovered in such cases for the purchase money and interest. (4 Kent, 475, 476, 477.)

Lansing Stout and *Kelly & Reed*, for the respondents, claim: That the covenant herein is a covenant for quiet enjoyment. (Rawle, 167, 168.)

When a party covenants against himself and his heirs, he covenants against the acts of himself and his heirs. (17 Ill. 185.)

What damages should be allowed. (Sedg. on Dam. 179-186, note 1; 9 Johns. 324; 13 Barb. 267.)

BOISE, C. J. The point here to be decided is, whether or not this covenant guarantees the grantees of Coffin by this deed, in the quiet enjoyment of the premises, against the former assignee of Coffin to the same premises. The language of the covenant is, "against the said party of the first part and their heirs." Assigns are not mentioned, and therefore not included; for this covenant must be construed, like any other contract, by the ordinary construction of its language. It is an express covenant, and therefore nothing can be implied to extend its obligations. It is not in the form of any usual covenant, and I think has very little significance. If the word *assigns* had been inserted in the covenant, it would then have been a covenant for quiet enjoyment. We think, therefore, that no recovery can be had on this covenant in this case.

Judgment is reversed.

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THE OREGON CENTRAL R. R. CO., RESPONDENT, v. AARON
E. WAIT, APPELLANT.

Appeal from Clackamas County.

RIGHT OF WAY.—**JOINDER OF DEFENCES.**—In an action to condemn land for a railroad, the defendant has his choice, either to rely on what the statute (Code, p. 670, 345), denominates a legal defense, or waiving that, plead the value, or resulting damages, or both; but he cannot on the same trial, contest the plaintiff's right to take the land, and try the question of damages.

DAMAGES.—Exception taken was this, "that the plaintiff below was allowed to prove on trial, that the construction of a railroad across the land of the defendant, would be of more benefit than damage thereto, excepting the value of the land actually taken by plaintiff," and the instruction of the court therein, excepted to was thus, "if the benefits to the lands of the defendant, are equal to the damages, then all that you should assess is the value of the land taken:" *Held*, these are not errors.

COSTS.—**TENDER.**—A tender of one hundred dollars was made on the day of trial by plaintiff, which the defendant refused to take, and failing to recover by verdict, more than fifty dollars, the defendant was adjudged to pay all costs subsequent to the tender: *Held*, that under sec. 49, p. 671 of Code, this was error, the tender not having been made before the commencement of the action.

FENCE.—Who is to build the fences along a railway?

THE Oregon Central Railroad Company, alleging a due incorporation, with its place of business at Salem, Oregon, averred that it needed a right of way over certain lands owned by A. E. Wait, defendant, and described the claim across which the line of road was desired, and the direction thereof. Plaintiff desired an appropriation of thirty feet on each side of the center line of road; and prayed an assessment of the damages therefore, alleging an inability to agree with the owner of said land for such right of way. The defendant Wait, answered on the fifteenth of March, 1869, denying knowledge sufficient to form a belief as to the legal incorporation of plaintiff, and averring that the land, actually sought to be appropriated, was over ten acres, and that the damages, which he would suffer by such passing of plaintiff's railroad over his land claim, would be

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twelve hundred dollars. The reply joined issue upon the questions of amounts of land and damages. On the nineteenth of March, on motion, that part of the answer substantially denying the incorporation of plaintiff, was stricken out, and this was excepted to by defendant. On the twenty-second day of March, the cause was called for trial, and on the same day, the plaintiff's counsel in writing, tendered to the defendant a judgment in his favor for one hundred dollars, which was refused. After verdict for fifty dollars, the clerk taxed the costs, etc., in the action, accruing after such tender of judgment, against the defendant, in the sum of \$38.75, and on an appeal, the court below confirmed such taxation, and from the several rulings defendant appealed, alleging error as to each ruling.

Wait & Kelly, of counsel for the appellant, set forth as the errors relied upon.

1st. In requiring the defendant to elect to withdraw a part of the answer, and in striking out that part of the answer (set forth above).

2d. In overruling the objections of defendant thereto, and in allowing the plaintiff to give evidence, tending to prove "that the construction of a railroad across the land of the defendant, would render the remaining land more valuable, and that the railroad would be a benefit to the land not appropriated, and that such benefits would exceed all damages to the defendant's property, except the value of the land actually appropriated by plaintiff.

4th. In sustaining the decision of the clerk, taxing all the costs against the defendant, which accrued after tender of judgment.

6th. In declining to instruct the jury, without addition or qualification as follows:

"The verdict of the jury in this action, should secure to the defendant compensation for all the damages resulting from the appropriation of the land sought to be appropriated, irrespective of any increased value thereof, by reason of the proposed improvement by the plaintiff."

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Upon the first error, counsel claim that, as a jurisdictional question, the denial of the legal incorporation of the plaintiff should have remained in the answer and cited 7 Mass. 353; 21 Pick. 535; 1 Bibb. 262; 7 Porter, 37; 5 Monroe, 261; 3 How. U. S. 762, etc.

That it was in fact a plea in bar—and cited 11 Mass. 313, 119; 7 Pick. 62; 3 Met. 235, 417; 15 Wend. 315; 13 N. Y. 309; etc.

Upon the other question—counsel claimed, that *before* sixty feet of land in width across the farm of defendant could be rightfully appropriated, the defendant was entitled to all damages necessarily resulting therefrom, including expense of fencing, crossways, and the inconvenient or unsightly condition in which the remainder of the land is left—and cite Gen. Laws, pp. 99, 665 and 671.

The claim that the judgment of the court appropriates the property, and the compensation for the property must precede the appropriation, and that any benefits from the railroad are prospective and cannot be deemed compensation.

That the property of which defendant has been deprived is the strip of land before mentioned—an enclosure against all other owners, persons, and animals—the right to use the whole farm without obstruction, and without the expense of constructing crossings, and without a severance, which renders the farm undesirable and comparatively worthless; and that these have all been taken, and without compensation first made therefor.

They claim that the court, by its rulings, denied to defendant the cost of fencing against the railroad, and the judgment of the court presumes the defendant has been paid that cost.

What damages are to be assessed? (Redfield on Railways, pp. 263, 483, 489, 287, 291; 47 Maine, 207; 10 Ind. 123; 31 Cal. 371; 23 Vt. 613; 22 Ill. 222; 15 Ohio, 39.)

They claim an improper taxation of costs, against defendant.

Mitchell, Dolph & Smith, for respondent, claim: 1st. The defense, denying the incorporation of plaintiff, could not be

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set up in conjunction, with an averment of the value of the land, or damages. (Gen. Laws, sec. 45, p. 470.)

2d. It was in the nature of a plea in abatement. (1 Pet. 387; 4 Wash. C. C. 662; 1 Mass. 480; 27 Conn. 282; 44 Me. 49; 39 Id. 571.)

A plea in abatement cannot be plead with a plea in bar. (2 Or. 49; 7 Barb. 368.)

Upon the second assignment of error, counsel claim, that compensation for private property taken for public use need not be made in money, but may be made in resulting benefits. (3 Allen, 137; 8 Barr. 445; 17 Wend. 649; 13 Barb. 169, etc.)

That the material inquiry is, is the property injured or benefited?

That the clause in the statute, "irrespective of any increased value thereof," refers to the strip of land only, and not to compensation for resulting damages to other lands not taken.

The court charged the jury that "neither the plaintiff or defendant were required to fence the lines of the land sought to be appropriated, but either party had a right to fence when business or convenience prompted," and that such is the law in Oregon.

They claim the taxation of costs was in accordance with law. (Gen. Laws, sec. 511.)

WILSON, J. Appellant excepted to the striking out of his answer the denial of the incorporation of respondent, and claimed that, as a denial to a material allegation, it was not a plea in abatement, and not inconsistent with our laws, which gives to a defendant only the right to *demur* or *answer*—that it was a plea in bar of respondent's right to recover, going to the merits of the action, and cited authorities. Appellant further claimed that in this case it was also a jurisdictional question, and could not be waived by the court.

Respondent claimed that such pleading is prohibited by sec. 45, p. 670, of the Code, and that a plea in abatement cannot be pleaded with one to the merits.

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We deem it unnecessary to marshal the authorities on this point, and decide from them, either as to the influence of this plea or the nature of it. Sufficient that many of the authorities cited declare it a plea in abatement, and as many more a plea in bar. Our code decides this question in our view. Sec. 45, p. 670, is in these words: "The defendant in his answer may set forth any legal defense to the appropriation of such land, or any portion thereof; or, omitting such defense, may aver the true value of the land in question, or the damage resulting from the appropriation thereof, or both." This section forms a part of the law on corporations, and we find no difficulty in construing it to mean this—legal defenses must be pleaded separately—if plead, then issues of merit cannot be joined with them. A defendant has his choice to either rely upon a legal defense, or, choosing to omit that, may plead value, or damages, or both. Evidently this plea amounted to a legal defense, and defendant could have relied upon it; but the law plainly declares, he could not first rely upon that, and failing, resort in the same answer to the merits. We think the court below was right in requiring defendant to select which defense he relied upon; and in case he did not so indicate, to strike out one of them, and there was no error here.

The second point in which error is alleged may, from the exceptions taken, be expressed thus: "that the plaintiff below was allowed to prove on trial, that the construction of a railroad across the land of the defendant, would be of more benefit than damage thereto, excepting the value of the *land* actually taken by plaintiff;" and that the court, based thereon this instruction: "if the benefits to the lands of the defendant are equal to the damages, then all that you should assess is the value of the land taken." In the constitution of Oregon in sec. 4, art. XI, is found this provision: "no person's property shall be taken by any corporation, under authority of law, without compensation being first made or secured, in such manner as may be prescribed by law." Under this power the legislature enacted a law relating to corporations, and among its provisions are these: After

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stating that a company may appropriate lands for track, for buildings, a right of way over other lands in constructing these, and for side tracks, etc., in the latter part of sec. 24, p. 665, Gen. Laws, there is the following provision, "but no such appropriation of private property shall be made, until compensation therefor be made to the owner thereof, irrespective of any increased value thereof, by reason of the proposed improvement by such corporation, in the manner hereinafter provided." The manner of procuring an assessment of the value or damages, is found under title III, p. 670, and in case the owner and the corporation cannot agree upon the amount, the corporation may commence an action to estimate the same; and section 45, p. 671, designates what claims the owner may set up, viz: "the true value of the land in question, or the damage resulting from the appropriation thereof, or both." From these provisions, there can be no question as to the owner's right to recover the true value of land appropriated, in any event, and the respondent admits this. We think that sec. 24 is declaratory of this, that the land cannot be appropriated until compensation therefor be made, or, in the language of the constitution, *secured*, to the owner; and that this compensation is to be estimated irrespective of any additional value, which may be given to that designated strip by any buildings, or other improvement which may be put thereon by the corporation. It does not mean that the compensation shall be estimated irrespective of any additional value given to other lands of the same owner, adjacent thereto. The compensation is secured by the award of the jury in view of the whole case, and by the judgment of the court thereon. The issue was properly submitted by the court to the jury, that the damages are to consist of the value of the land appropriated, irrespective of any additional value to it, etc., and then, if such appropriation injures the other land of that owner, over and above the benefits or additional value of those lands, by the improvements by the corporation, an additional amount is to be awarded sufficient to cover such excess of injury over benefit, etc.

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In this question are involved, we think, fences, cattle-guards, disadvantage of crossings, and all points of inconvenience and expense. The main objection seems to be that this is a compensation, which cannot be tendered or paid in advance of the improvement; but the allowance by a jury covers all these questions, and there can be no damage to other lands, in case the corporation fails to build the road, forfeiting its charter, and suffering the lands to fall back to the owner; in which case he receives his land again, additional to the damages paid, or secured in judgment.

Our law does not require that either the corporation or the land owner shall build fences along the track, but we think that is one of the questions involved in the issue submitted to the jury, and we can readily conceive of many conditions, where the fencing of a track would neither be useful or ornamental, and totally unnecessary. It might be considered as damages received, or secured, under the view of this proposition—if by the locating and building of a railway, the lands crossed by it are raised in value, a certain amount per acre, it would, under the construction of our constitution and laws, be unjust that the owner of such lands should claim and receive compensation for all the fences he may or may not be forced or find convenient to build, all cost of cattle guards, of crossings, of all inconveniences, and say to the company you have increased my property in value so many dollars per acre, but you shall not offset that against these inconveniences, and I will take the benefit in both ways. Such is not the spirit, or our construction of the law—roads generally are laid out, and under the provisions of the constitution, damages only are given for the excess of injury over resulting benefits—and in other instances the operations of the laws are in accordance with our construction. We think no error was made here.

The third point is, that the court adjudged costs, etc., against appellant which accrued after the tender by the respondent on the twenty-second of March; and we think there was error in this. Section 49, p. 671, Gen. Laws, provides, that all costs and disbursements of defendant shall

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be recovered of the corporation, unless the corporation, *before* commencing the action, tender the defendant an amount greater than, or equal to, that assessed by a jury—in which case the corporation shall recover its costs, etc., of the defendant.

The tender in this case was made upon the day of trial, long after the commencement of the action, and no benefit of tender under the law accrued to the respondent.

Section 511, Gen. Laws, cited by counsel for respondent, is applicable to cases generally, but the special law of corporations carries its special provision with it, which latter must govern. It was as though no tender had been made, and we must modify the judgment by reversing that allowance of costs to respondent. In other respects the case stands affirmed.

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ROBERT BROWN, APPELLANT, v. A. B. MOORE AND D. M. FRENCH, RESPONDENTS.

Appeal from Wasco County.

VARIANCE—In an action on attachment bond, one allegation was, that the plaintiff had actually contracted a sale of the grain, afterwards attached; and the evidence rejected was, that he had a conditional promise, that upon a certain contingency the buyers would take the grain, and that contingency afterwards happened. *Held*, without deciding whether the rejected evidence made out a ground for special damage or not, that it was a variance which the court might disregard. *Held* also, that if it was discretionary to admit the evidence, nothing short of an abuse of discretion could be assigned as error.

SPECIAL DAMAGES.—An allegation that the plaintiff could have earned five or seven dollars per day in hauling said grain under proposed contract, is not a sufficient averment to warrant special damages thereon. It does not show that he might not have earned an equal or greater amount, during the same time, elsewhere.

THIS action was based upon an undertaking entered into in a civil action to procure a writ of attachment. The complaint charges that the attachment was unlawfully issued,

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and unlawfully levied upon about 100 bushels of oats, 100 bushels of wheat, 800 bushels of barley and ten tons of hay—one half of which belonged to plaintiff—that the property was detained, specifying the time, and the plaintiff was damaged thereby \$220. Several grounds for special damages are set forth, two of which are stated as follows: Shortly before the said levy, the plaintiff made an agreement with Robbins and Weaver, to take of him, at Camp Watson, between 10,000 and 12,000 pounds of said grain, at four dollars per hundred pounds, in coin, which would have yielded, after deducting freight, \$2.10 per hundred. That, after said attachment was discharged, the said plaintiff sold said grain for \$1.62½ per hundred, the highest price he could obtain for the same, and thereby sustained loss in the sum of \$52.25. That by means of the said plaintiff being prevented from freighting the said 10,000 or 12,000 pounds of grain to Camp Watson for Robbins and Weaver, according to the said contract made with them, the said plaintiff sustained great loss and damage, to wit: damage in the sum of \$100. On these points the answer is as follows: “the price of grain when the plaintiff pretends to have sold his to Robbins and Weaver was about two cents per pound and no more, and the amount agreed upon for the delivery of grain at Camp Watson would not allow more than two cents per pound for the grain. Defendants deny that plaintiff had contracted his barley to said Robbins and Weaver. The defendants deny that the plaintiff necessarily lost any time on account of said attachment. On the trial, O. W. Weaver, a witness, testified that in July, 1868, the plaintiff contracted with Robbins and Weaver to deliver to them at Camp Watson, 130 miles distant, 100 bushels of oats at four cents in coin per pound, and that there was also an understanding between the contracting parties, that if the United States quartermaster would receive from Robbins and Weaver barley upon a contract, where Robbins and Weaver had undertaken to furnish oats, in that case, Weaver would receive from the plaintiff all the barley which plaintiff had raised, at four cents per pound; and that it was

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afterwards ascertained, that Robbins and Weaver would have received plaintiff's barley at four cents per pound. On motion of defendant's counsel, this evidence was ruled out. The plaintiff offered to prove that he could have earned from five to seven dollars per day by hauling the grain in question to Camp Watson, and that it would have taken him about a month and eight or ten days to haul it. The court refused to admit the evidence. The judge instructed the jury that the plaintiff was not entitled to special damages, because of his alleged contract with Robbins and Weaver; nor for loss of profits, that he might have made in carrying the grain to Camp Watson. The plaintiff had a verdict and judgment for \$40.50.

Kelly & Reed, for the appellant.

O. Humason, for the respondents.

URTON, J. The plaintiff appeals from a verdict and judgment in his favor for an amount less than that claimed by him, and assigns as error :

1st. The ruling out of evidence in relation to the delivery of barley at Camp Watson.

2d. Ruling out the plaintiff's testimony concerning the profits he could have made by hauling the barley to Camp Watson.

3d and 4th. In instructing the jury on the same points.

The first and third assignments of error present but one point. Without examining the question whether the facts stated in the pleadings in regard to the contract for the delivery of barley, and its non-fulfillment, are a sufficient foundation for special damages—it seems, from the record, that the evidence rejected did not correspond with the allegations of the complaint. The allegation was, that the plaintiff had actually contracted to a sale of the grain, but the rejected evidence was, that he had a conditional promise—a promise, that, upon a certain contingency, the buyers would consent to take the grain, and that that contingency afterwards happened. If the evidence would have laid a

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sufficient foundation for the special damages, it was within the discretion of the court to disregard the variance between the allegation and the proof. (Secs. 94 and 95 of the Code.) But nothing short of an abuse of that discretion could be assigned as error on appeal—besides it is not clear that the facts offered in evidence would make a case for special damages. The second and fourth assignments of error relate to the special damages arising out of the loss of the business of hauling. The pleading is fatally defective upon this point. It is not shown that the plaintiff was thrown out of employment, or that the five or seven dollars per day that he could have earned with his team in the business of hauling was any more than he could have earned at other business. The allegations on this point, if true, do not show that he was specially damaged in this particular. (1 Chitty, Pls. ss. 395, 398, 399.)

Judgment is affirmed.

8	438
8	312

JOSHUA B. POOL, APPELLANT, v. WM. G. BUFFUM, RESPONDENT.

Appeal from Jackson County.

WILL, EXECUTION OF.—Construction given to section 5, p. 355, of statute of 1854, and of sections 4 and 5, code, p. 936.

IDEM.—The making by a testator of his mark to his will is a signing of the will.

IDEM.—If another person signs the testator's name to the will, unless it be done by the testator's direction, it was not necessary for that person to state that he "subscribed the testator's name."

THE matter controverted in this case was submitted to the circuit court for determination without action, under section 254 of the practice act, by a statement in writing, containing the facts. The case, stated by the parties, shows that James R. Pool, a brother of said Joshua B. Pool, a resident of Jackson County, in this state, died in California, October 28, 1868, leaving both real and personal property

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in this state; that afterwards an instrument was admitted to probate in Jackson County, as the last will and testament of the said James R. Pool, a copy of which is given. It is attested as follows: "In witness whereof, I have hereunto set my hand and seal, this third day of August, in the year of our Lord one thousand eight hundred and fifty-eight.

"JAMES R. ^{his} X POOL.
_{mark}

"NELSON WALLING; residence, Polk County, O. T.

"THOMAS B. JACKSON; residence, Yamhill County O. T."

The case stated shows that the name of James R. Pool was placed at the bottom of said instrument by Thomas B. Jackson, one of the subscribing witnesses above named, and the mark in said name was made by James R. himself. The question submitted was whether the facts thus stated show a good execution of the instrument, as the last will and testament of James R. Pool, deceased.

B. F. Dowell and O. Jacobs, for appellant.

Every will shall be in writing, *signed by the testator*, or by some one under his direction, in his presence, and shall be attested by two or more witnesses, subscribing their names to the will in the presence of the testator. (Stat. of 1854, p. 355, sec. 5.)

Every man who shall sign the testator's name to any will by his direction, shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request. (Code, p. 936, secs. 4 and 5.)

That a fair construction of these two sections would exclude the idea that a will could be validly signed by a mark alone.

A respectable minority of state courts have decided that a signing by mark was not sufficient. (Redfield on Wills, p. 203-205, note 6.)

That the majority is the other way. Can the signature be treated as surplusage, and the *mark* in it made by Pool, held as a sufficient signature. (Redfield on Wills, vol. 1, p. 204; 21 Mo. 17; 20 Mo. 266.)

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J. D. Fay and Lansing Stout, for respondent.

The act of making a mark with the intention of signing is a signature within the primitive and original meaning of the term. (11 Bur. L. D. 466.)

A mark intended as a signature is regarded in law as a full and complete signature. (11 Green Ev. sec. 674; 1 Sugden on Powers, 331, etc.)

Signatures by marks are treated as original signatures. (27 Barb. 556; 12 Cush. 332; 13 U. S. D. 703; 20 U. S. D. 533; 16 B. Monroe, 102; Redfield on Wills, 227.)

Substantial compliance with statute is sufficient. (2 Barb. 200.)

UPTON, J. This appeal presents the question whether the instrument under consideration is valid as a will, notwithstanding, the subscribing witness, who wrote the decedent's name, did not state in writing that he subscribed the testator's name at his request.

Section 4, code, p. 936, provides: "Every will shall be in writing, signed by the testator, or by some other person under his direction, in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator."

Section 5 provides, that "every person who shall sign the testator's name to any will, by *his direction*, shall subscribe his own name, as a witness to such will, *and state* that he subscribed the testator's name at his request." It does not appear by the case presented, that the witness, Jackson, *stated* that he subscribed the testator's name at his request, nor whether he signed it "by his direction."

The case of *St. Louis Hospital Association v. Williams, Adm'r.*, 19 Mo. 609, is cited in opposition to the validity of the instrument. The statute of that state is identical in language with sections 4 and 5 above set out, and it was said in the course of the argument, that our act concerning wills was copied from a statute of Missouri. Decisions in other state courts, upon statutes in terms identical with our own, are of great assistance in construing the language used

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whenever there is ambiguity in its meaning. In that case, SCOTT, J., who delivered the opinion, says: "The essential words of our act correspond with those of the statute 29 Charles, II, which relates to wills, the received construction of which is, that a mark is a sufficient signing, and that, notwithstanding the testator was able to write. (1 Jarman, 69.) But when a will is authenticated apparently, both by a mark and the name of the testator, our statute makes it material to ascertain whether the testator's name was put to the will by his direction. It is not necessary there should be an express direction. A direction may be proved by circumstances. The finding of the court is silent as to this material fact. It either did or did not exist. The judgment of the court, being for the will, would warrant the inference, that in its mind there was no direction of the testator's to put his name to the will, or in other words, that the act was unauthorized. We are of the opinion that the conclusion should have been drawn from the facts existing, whether the act of signing the testator's name was authorized by him or not. It should have been found one way or the other by the court trying the cause." "In viewing the law of a case, on the facts found, it is not the province of this court, from one or more facts found, to declare the existence of another fact. This judgment must then be reversed, in order that it may be found whether the name of the testator was written to his will by his direction."

In that case, the particular error committed by the court below, was a failure to find upon a question of fact. That court heard the evidence, and was required by law to find the facts from the evidence, and it was held, that the circuit court in failing to do so, committed an error, for which the case was sent back for a new trial. In the case before us, the parties stated the facts in writing. The court below had no occasion to weigh evidence or find conclusions of fact, and could not commit the error, for which the judgment in that case was set aside. That case affirms these two important positions:

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1st. When the testator attests a will by his mark, it is a sufficient signing, and is a valid mode of executing a will.

2d. It is not necessary for the subscribing witness to state, that he subscribed the testator's names, "at his request," unless he signed it to the will, by the testator's direction.

The case above noted, and that of *Northcutt v. Northcutt*, 20 Mo. 265, are relied upon as decisive against the validity of the will in this case; but the latter is entirely consistent with the former, and places the necessity of the "statement" upon the statutory requisition, making it depend upon the fact, that the signing was "by the testator's direction." In this case, it is admitted that the decedent made his mark; that is, according to those cases, he signed the will, in the presence of the two subscribing witnesses. This then, is a good execution of the will, according to the opinion delivered by SCOTT J., unless it has been rendered null by ineffectual attempt of one of the subscribing witnesses to make the act still more formal and conclusive. The case stated shows, that the witness Jackson, placed the name of the testator at the bottom of the will, but does not show whether the act was done by the testator's direction. According to the cases cited by the appellant, if it was not done by the testator's direction, it was not necessary for Jackson to "state that he subscribed the testator's name." The facts here stated, disclose acts done, sufficient in themselves to make a valid will, if not impaired or vitiated by other circumstances occurring at the time, and the case leaves an uncertainty, whether or not such circumstances existed, or such other acts were done, as to render those, which otherwise would have been sufficient, ineffectual to carry out the known and admitted intention of the testator. A technical right, when perfectly established, is as much entitled to protection as any other right. It is entitled to the protection of the law from the fact that it is a right. It is the duty of a court to respect the rules of positive law, whether technical or otherwise; but it is a distinguishing feature of a technical right, that it invokes no

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implications in its favor. It is, therefore, altogether just and proper to require, that one who rests his cause upon a pure technicality, should himself be technically correct, and be fortified against similar claims. In construing contracts or wills, effect should be given to the intention of the parties when ascertained, if it is possible to do so without doing violence to positive law.

The question here is, whether the circuit court committed an error in upholding the instrument in question, as a last will and testament. The case stated omits one fact, which, in the case first above cited, was deemed material. Without that fact, that is, without being informed, whether writing the testator's name was or was not done by his direction, it is not possible to say whether it was or was not the duty of the writer to do more than was done. It is not before us to say how the case would stand if issue were joined, and the witness Jackson was produced to show that the decedent did make his mark, or did direct the witness to write his name. The admissibility of the evidence would present a very different question from the one before us. It is admitted that the decedent did make his mark—there is no question of admissibility of the evidence to prove the execution. It is settled by the case as stated, that the decedent sought to execute the instrument as his will. If the decedent affixed his mark to the paper, it is a signing within the meaning of the statute, as construed in cases from Missouri, without his name being written at the place of signing. For aught that appears in this case, the writing of the name of the decedent by the subscribing witness may have been done while the will was being executed, or it may have been an independent or separate act, done after the instrument was complete. It may have been done at the decedent's request, or it may have been done officiously, under an erroneous impression that such a writing was a necessary formality, and without any direction from the decedent. If done at the time of making the mark and under decedent's direction, it would be a question not touched by any of the cases cited, whether an act that

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amounted to a signing would lose its efficacy by a repeated signing, without the annotation required. If done without any direction from the decedent, the want of the notation would not vitiate the decedent's acts. If we are to hold that every one who writes the testator's name by the testator's request, is literally within the statute, we include every case where the testator takes no part physically in the act—cases where he makes his mark and another writes his name; and a class of cases where the party subscribing writes his name in a language or by means of an alphabet not in general use in the country where the act is done, and some other person writes the name in the ordinary alphabet, by way of explanation or interpretation of the characters used in the signature. In such a case, the writing of the name, though perhaps convenient, is not necessary to the validity of the will, and its being done scarcely raises an inference whether or not it was done by the direction of the testator, or party signing. If one should make a last will, subscribing his name in full, and another *without his request* should write the decedent's name again upon the instrument, for any reason, either because the name was in an alphabet not in common use, or that through sickness or for other cause, the name was so obscurely written as to make some explanation desirable, it would not be a case within the provision of the statute. So in this case, if the mark is a signing, and it is unknown whether the name was written at the same time, or after the occasion when the mark was made, if it is also unknown whether it was done under the direction of the decedent, what presumption is to be indulged; or what is the duty of the court in the absence of any legal presumption? Shall a court without proof assume that the writing of the name was done at the particular time, or under decedent's direction, when it is obvious to the court, from the agreed case here stated, that such an assumption will defeat the intent of the decedent? If we assume that the decedent knew the law, we must see that he had no reason to give such direction; and if the subscribing witness knew the law, he either received no

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such direction, or he neglected his duty, and was guilty of a wrong in not noting the fact that "he subscribed the testator's name at his request."

Where one makes his mark, and another at his request writes the name, which one signs? If making one's mark is a signing within the law, it may be doubted, whether the writing of the name by another at the same time is a *signing* within the meaning of the statute—but it is not necessary to pass upon that question.

It does not appear from the case stated that the witness, Jackson, wrote or signed the testator's name *by his direction*, and it does appear that the testator himself made his mark, which is a signing according to the authorities cited by the appellant. There is enough in the case stated to justify the circuit court in sustaining the will. On appeal, error will not be presumed, but must affirmatively appear by the record.

The decree below should be affirmed.

PETER A. WEISE, APPELLANT, v. SAMUEL SMITH,
RESPONDENT.

Appeal from Clackamas County.

NAVIGABLE STREAM.—How far the principles and rules pertaining to the navigation of tide waters and large streams, are to be applied to fresh water streams above the flow and ebb of the tide.

IDEM.—The common law rule, making the "ebb and flow of the tide the test of navigability" is not now applicable in the United States.

IDEM.—If a stream is capable in its natural condition of being profitably used for any kind of navigation, its use to that extent is subjected to the general rules of law relating to navigation.

IDEM.—Such a stream, generally useful for floating boats, rafts, or logs, or for any useful purpose of agriculture or trade, though it be private property, and not strictly navigable, is subject to the public use as a passage way.

BOOMS.—How far such stream may be obstructed by use, or by booms, etc.

RIPARIAN RIGHTS.—The right, to meddle with or touch upon the banks of such a stream, is founded upon necessity.

3	445
10	375
10	382
17	180
20*	838
3	445
187	11

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IDEM.—The riparian owner has an absolute right to enjoy his lands, in all proper ways—the other party has an absolute right, as one of the public, to navigate the stream—neither can justly deprive the other of his rights and their incidents.

TRESPASS.—If there had been no necessity for fastening a boom to plaintiff's land, that act was a trespass—that necessity was a question for the jury.

REASONABLE TIME.—Keeping such boom fastened too long would be an obstruction—what was a reasonable time for removal of boom is a question for the jury.

THE complaint in this action alleges in substance, that Peter A. Weise, the plaintiff, is the owner of the land situated at the mouth of the Tualatin river, upon the southerly side thereof, and that Samuel Smith, the defendant, placed a boom fast upon the land of the appellant, and kept it across said river, to the damage of the plaintiff in the sum of five hundred dollars.

The answer sets up in substance, that the respondent was engaged in the business of floating saw logs in the Tualatin river, from points on the said river above plaintiff's land, to the sawmills, that are in the vicinity of Oregon City. That the Tualatin, although a navigable stream, for the purpose of rafting saw logs, cannot be used for that purpose without placing a boom where respondent's boom was placed. That placing said boom there was necessary, and that the defendant had a right so to place it. That it was so placed for public use free of charge—that the public had a right to use the river for the floating of logs. The evidence disclosed that the Tualatin river, immediately above its confluence with the Willamette river, that being where the boom was placed, was for a short distance navigable for large vessels; and from a point two or three miles above the place of the boom, it was navigable for small steamboats up the stream, a distance of twenty-five or thirty miles. That, although for a space of two or three miles above where the boom was placed, the river is not otherwise navigable, yet saw logs can be conveniently and profitably floated the whole distance from the highest point of navigation, down the Tualatin river into the Willamette river. But owing to the situation of the confluence of these rivers, which is a short distance above

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the Willamette falls, unless a boom is so placed as to retain the saw logs on their reaching the mouth of the Tualatin, the logs would necessarily be swept over the falls by the current of the Willamette, and thus lost. It had been a practice of people, who were engaged in transporting logs down that river, to detain the logs by means of such a boom. While receiving logs into the boom its upper end was attached to a small island in the Tualatin, the property of the plaintiff, from which the line of boom passed down the Tualatin to its mouth, and into the waters of the Willamette, the lower end curving south and being made fast to the bank of the Willamette south of the mouth of the Tualatin. When thus used the line of the boom intercepted the most convenient course of the plaintiff's skiff, in which he was accustomed to pass to and from Oregon City, his ordinary market place. The boom was so constructed that, when not receiving, but merely retaining logs, the upper end could be detached from the island and made fast to the south bank of the Tualatin, in such a manner as not to leave the boom in the way of the plaintiff's skiff. On the occasion complained of, the defendant having attached the boom to the island, it remained in that condition about — days. There was evidence tending to show that during that time high water rendered it impracticable to make the change and remove the boom out of plaintiff's way. Judgment was rendered in favor of the defendant, and the plaintiff appeals, assigning as error:

1st. Admitting evidence to show that plaintiff had previously permitted booms to be placed and used in the same manner without objection.

2d. In instructing the jury, that if the Tualatin was adapted to floating logs, and a boom was necessary for that purpose, the plaintiff's right was subrogated to a reasonable use by the public.

3d. In permitting the jury to determine whether the boom was extended an unreasonable time.

Wait & Kelly, for the appellant.

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Johnson & McCown, for the respondent.

UPTON, J. It is conceded in the argument, that, to some extent, or for some purposes, the Tualatin river is a navigable stream from its mouth to many miles above the place in question. At the point of the alleged trespass, or a short distance above it, the river is not navigable for boats, but for the whole distance, the stream is available as a means of conveyance for saw logs. One of the circumstances set up by the plaintiff, as a basis for additional damages, is that immediately at the place where the boom was stretched, the plaintiff had occasion to navigate the river with his skiff; and that, by the alleged wrongful acts of the defendant, that navigation was interrupted. The chief inquiry and point in issue, touches the relation and liabilities existing between riparian proprietors, and persons using the stream, for purposes connected with navigation. It is necessary to consider how far the principles and rules that have been applied to affairs pertaining to the navigation of tide waters and large streams, capable of floating ships of commerce, are to be applied to streams like the one under consideration. While it is conceded by the appellant, that the Tualatin river is to a certain extent navigable, it is claimed that it is "a fresh water stream above the ebb and flow of the tide," and hence the rules applicable to arms of the sea, and great rivers, where the tide ebbs and flows, are not applicable here.

It may be considered the settled law of the United States, that so much of the doctrine of the common law of England, as made the ebb and flow of the tide a test of navigability, is not now applicable in the United States. On the contrary, the maxim of Lord Mansfield; "out of the fact arises the right," is applied by the courts of this country. (*Morgan v. King*, 35 N. Y. 454; *Jones v. Pettibone*, 2 Wis. 308.)

It is held more rational to determine the question of navigability or unnavigability of a stream, from the fact of navigation or otherwise, than from a circumstance which

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may or may not be conclusive evidence of its navigability. (*People v. Canal Appraisers*, 33 N. Y. 472.)

The case just cited, is a very full and thorough exposition of the test of navigability, and it is more than inferable, from the reasoning in that case, and in the numerous American cases there cited, that if a stream is in fact capable, in its natural condition, of being profitably used for any kind of navigation, its use is to that extent subjected to the general rules of law relating to navigation, applicable to the circumstances of the case. The large amount of lumber business done in the state of Maine, has undoubtedly led the courts of that State to give great consideration to the particular subject involved in this case, and they hold to the same rules on the subject of the use of small streams, that are announced in the case last cited. A stream, which, in its natural condition, is capable of being commonly and generally useful for floating boats, rafts or logs, for any useful purpose of agriculture or trade, though it be private property, and not strictly navigable, is subject to the public use as a passage way. (*Brown v. Chadbourne*, 31 Maine, —; 42 Maine, 558.)

“Though the adaptation of the stream to such use may not be continuous at all seasons, and in all its conditions, yet the public right attaches and may be exercised whenever opportunities occur.” (Id.) “When a stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs, the public easement exists, notwithstanding it may be necessary for persons floating logs to use its banks.” (Id.) “The Penobscot river above the tide is not a navigable stream, technically speaking, although a highway, floatable for boats, rafts or logs, and as such, subject to the public use.” (*Veazie v. Dwinell*, 50 Maine, 479.)

“No person has a right to permanently obstruct the channel of such stream by a boom across it, though he may do so temporarily, if necessary for the useful navigation of the stream.” (*Davis v. Winslow*, 51 Maine 264.)

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The court in this case remarks: "What is reasonable use, or due use, depends in every case on the subject matter, to which the case is to be applied, and the circumstances attending the subject matter at the time." Every person has an undoubted right to use a public highway, whether upon land or water, for all legitimate purposes of trade and transportation, and if in doing so, while in the exercise of ordinary care, he necessarily and unavoidably impede or obstruct another temporarily, he does not thereby become a wrong doer; his acts are not illegal, and he creates no nuisance for which an action can be maintained. If we concede the correctness of the reasoning in the above cases, it follows, that upon "a stream capable of being commonly and generally useful for floating boats, rafts or logs, for any useful purpose," and consequently "subject to the public use as a passage way," the persons lawfully using it can invoke in their favor all general rules of navigation that are in the nature of things applicable to the particular circumstances and kind of navigation. How far, then, may one, who has an undoubted right to navigate the stream, meddle with or touch upon the bank of the stream, which is private property? Whatever he has is founded upon necessity. If he has a right to meddle with the bank, it is only an incidental one. Although the riparian owner has an absolute right to enjoy his land, in all proper ways, the adverse party has an absolute right, as one of the public, to navigate the stream. Neither one can justly deprive the other of his rights. If the riparian proprietor could deny the navigator the right to come to land, in a case where the business of navigating could not be performed, without the privilege of landing, he could deny all use of the stream. He would thus overturn all that was contended for and adjudged in the cases above cited. While it is beyond question that the riparian owner is entitled to be protected from any unnecessary intrusion on his premises, it is equally certain that he cannot, solely for the maintenance of an abstract right, or an exclusive possession, deny to the public the

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right of navigation. He takes his title subject to this right vested in the public.

If there had been no necessity for fastening the boom to the plaintiff's land, the act of fastening it would have been a trespass, for which the plaintiff ought to recover nominal damages at least; but, if the act was necessary in order to enable the plaintiff to exercise a right of navigation, no cause of action would lie for a bare intrusion, which worked no appreciable damages. Whether the necessity existed was a question for the jury.

It was said in argument "the respondent claims the right to obstruct the river as a public right." I think this was stating the respondent's claim too strongly; he claimed the right to attach his boom as a public right, and as necessary in order to use the stream, and it is true that the boom if kept attached too long became an obstruction, but he sought to excuse his act of leaving the boom attached a considerable time upon the plea that an unexpected rise of water rendered it impossible to detach it sooner. If he had a right to extend the boom to catch the logs, he of course had a right to keep it extended a reasonable time for that purpose. The question, what was a reasonable time for the removal of the boom was a question of fact, and was properly left to the jury. The record does not disclose that the plaintiff was injured, or that admitting proof that the plaintiff had permitted booms to be placed on his land on previous occasions the court erred in that particular; for aught that appears by the record, it may have been properly offered in mitigation of damages.

Judgment should be affirmed.

 Bowen v. Emerson.

BOWEN & CHAMBERS, RESPONDENTS, v. WM. EMMERSON,
APPELLANT.

Appeal from Baker County.

PLEADING.—In an action for money due upon a contract, facts should be stated showing that a contract existed between the parties, and that it has been broken.

IDEM.—The complaint should state the promise and the consideration, or facts from which a promise or undertaking upon a sufficient consideration is necessarily inferred; and it should state facts showing that the time of payment has expired, or should show in what respect the contract has been broken.

DEMURRER.—The objection "that the complaint does not state facts sufficient to constitute a cause of action," is not waived by failure to demur.

The facts are stated in the opinion filed.

Kelly & Reed, for appellant.

L. O. Sterns, for respondent.

UPRON, J. The objection, that the complaint does not state facts sufficient to constitute a cause of action, is not waived by failing to demur. (Code, sec. 70.)

The complaint states that, "on or about the eighteenth day of February, 1868, plaintiffs sold and delivered to the defendant 4,000 lbs. of flour, and that the same was worth \$212." It does not show that the defendant undertook or became obligated to pay for the flour within a designated time, or within a reasonable time, or when requested; nor that the time of payment had arrived before the commencement of the action. For aught that appears from the facts stated, the property may have been sold on credit, the time of which has not yet expired; or it may have been sold and delivered to the defendant upon the request and credit of another, with a full understanding that the defendant was not to pay for it. It is assumed in argument that complaints like the one under consideration are sustained, by adjudications in other states, under codes similar to ours; and particular reference is made to the state of New York. A

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careful examination of the cases cited in support of this proposition will show that it is not correct. The decisions in some of the cases are based on special statutory provisions not contained in our code. For an instance, the code of New York, sec. 162, provides, that "in an action or defense, founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims." Precedents are found, following this statute, which do not state facts only, but state conclusions. The same is true of other special provisions of statute. Cases predicated upon special provisions not contained in our code, furnish but little assistance in this investigation. Fortunately, our code contains but few special provisions on the subject of pleadings that amount to a departure from the general rule, that the complaint shall contain a plain and concise statement of the facts constituting the cause of action. Attempts to simplify by making special provision for particular cases, or classes of cases, tend to complicate the system and to confuse, rather than simplify, the practice. They are generally a means of annoyance to the practitioner, and of delay and expense to parties. Every experienced pleader knows that there is nothing more difficult to the young practitioner, or that taxes more the memory of those who have experience, than to be compelled to conform to special statutes in pleading. Some of the cases cited purport to be based upon the general rule. The most prominent among them is that of *Allen v. Patterson* (3 Seld. 476). The opinion in that case, it must be conceded, is quite out of the general current of authority, and it is difficult to reconcile it with the numerous decisions in the same state, that announce and reiterate the rule, that the code requires facts to be stated, and not the conclusions that result from the facts. The opinion assumes, without argument and without citing any authority relating to the construction of any modern code, that the statement, that the defendant is indebted to the plaintiff in a certain sum, is

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the statement of a fact, and, with equal brevity, it reverses the long settled rule, that "if the meaning of the words be equivocal, they shall be construed most strongly against the party pleading them." The statement that the defendant is indebted to the plaintiff, is substantially the conclusion to be found by the jury at the end of the investigation. (*Lienan v. Lincoln*, 2 Duer. 670; *Drake v. Cockraft*, 4 E.D. Smith, 34; *Seely v. Engell*, 17 Barb. 530; *Levy v. Bend*, 1 E. D. Smith, 169.) ●

It is not necessary in this case to determine to what extent the case of *Allen v. Patterson* should be considered law, because the complaint in this case does not show, by stating either facts or conclusions, that the defendant is indebted. The case of *Farron v. Sherwood* (3 Smith, 229) states the following rule, which seems entirely consistent with the enactments of the Code: "It was not necessary to state in terms a promise to pay, it was sufficient to state facts showing the duty from which the law implies a promise." A fault with the complaint in this case is that it neither states a promise to do any certain act at any specified time, nor states facts from which a duty to do so necessarily arises; or from which a promise is necessarily inferred. It is not probable that any method of pleading, in actions for money due upon contract, will ever be discovered, that is more simple and easy in practice, or better calculated to apprise the court and the parties of the grounds and nature of the action, or more likely to leave a clear and concise record of what has been done, than that which is now prescribed in the code. Notwithstanding this conceded truth, we sometimes meet with pleadings in this class of actions that neither conform to the common law, nor to the requirements of the code. In actions for money due on contract, the common law required a concise statement of the facts, and in some particulars, the employment of technical language—the code requires a *plain* and concise statement of the facts. In other words, the common law required the facts to be stated concisely, and sometimes in technical language; the code requires the facts to be stated concisely and in plain,

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or ordinary language. In this class of actions, the pleader is required to state the facts, that show that a contract existed between the parties, that it has been broken, and in what particular, and the amount of damages the breach has caused. Facts only must be stated, as contradistinguished from the law, from argument, from conclusions, and from the evidence required to prove the facts. (*Coryell v. Cain*, 16 Cal. 571.)

The complaint does not in this case state facts sufficient to constitute a cause of action.

Judgment should be reversed.

J. S. FELGER AND WILLIAM PEARSON, RESPONDENTS, v.
F. E. ROBINSON AND W. F. HERNDON, APPELLANTS.

Appeal from Benton County.

COMPLAINT.—An allegation that Mary's river was declared navigable for floating logs * * from Metzger's mill to the farm of William Wood * * and said logs were floated on said stream within said points, does not contain any claim of right to float logs over and past the dam at said mill.

CONSTRUCTION.—The right to float logs between certain points would not justify their doing damage at the terminus.

NAVIGABILITY OF STREAMS.—Any stream, on whose waters logs and timber can be floated to market, is navigable, and is a public highway for that purpose.

IDEM.—It is not necessary that the stream should be so available during the whole year to constitute it a navigable stream.

THE complaint in this case alleges that the plaintiffs are the owners of the real estate described therein, and that Mary's river, in its natural course, flows through the same, and is not a navigable stream; and that plaintiffs are the owners of a dam and mill on said premises, which said mill has been used by plaintiffs and their assignors for many years.

That on the first of January, 1869, the defendants put into the said stream, above plaintiff's dam, drift wood,

8	455
10	332
17	180
17	180
20	838
20	841
3	455
37	12

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timber and logs, which floated down upon the dam and destroyed it, and made it useless, and that the mill was thereby rendered useless for about a month. There are other allegations in the complaint, with a view to charging consequential damages, but they are not material to the decision of the case in this court. The answer denies every material allegation in the complaint, and then, by way of new matter alleges, that Mary's river is a navigable stream, being made so by the action of the Board of County Commissioners of Benton county, about the year 1856, in pursuance of a general law of the then territory of Oregon. The answer also sets up as a defense, that said stream has been used for twenty years, for the purpose of floating logs down the same, by the inhabitants of the county, without objection, and that, therefore, the public have acquired a right to navigate the same for that purpose, by prescription. To this answer the plaintiffs demurred, and the court below sustained the demurrer to those parts of the answer, which set up the right to navigate said stream, under the authority acquired by the action of the Board of County Commissioners of Benton county, and the right by prescription. to which ruling exception was duly taken. The case then went to trial on the issues raised, between the complaint and answer, and the question as to whether the stream was navigable or not, was left to the jury, and the jury found a general verdict for the plaintiffs.

Thayer, Burnett & Strahan, for appellants.

What defenses may be set up. (Code, p. 157, sec. 72.)

Legislative bodies may declare streams navigable, and their action will not be slightly regarded. (Session Acts of 1856, p. —; 18 Barb. 277.)

The acts of the Territorial Legislature, unless disproved by Congress, are binding. (Organic Act; Laws of Oregon, p. 80, sec. 6.)

Under such act of the Legislature, the County Commissioners rightfully declared Mary's river a navigable stream, and appellants had a right to float logs there.

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Shores of navigable streams, and the soil under the stream belong to the State as sovereign, and the public have an easement therein, or right of passage, as a highway. (3 Kent Com. 427; 3 How. U. S. 212; 31 Maine, 9.)

Chenowith & Williams, for respondents.

The answer showed no prescriptive right. (Ang. on Highways, 102.)

No act of the Legislature can authorize County Commissioners to take private lands without compensation. (6 Cow. 535; 6 Barb. S. C. R. 265; 17 Johns. 195.)

Legislation cannot interfere with the primary disposal of the soil. (Organic Act; Laws of Oregon, p. 70, sec. 6; p. 76, sec. 14.)

BOISE, C. J. The main questions for this court to determine, are 1st, was the ruling on the demurrer correct. The allegation in the answer is, "that said Mary's river was duly declared navigable for the purpose of floating logs by the Board of County Commissioners of the county of Benton, * * * in pursuance of law, etc., from said Metzger's mill (the mill in question), to the farm of Wm. Wood in King's valley, said county, etc., and said logs were floated on said stream, within said points."

There is no allegation that, by said declaration of navigability, defendants were authorized to float saw logs over and past said dam, and the damage complained of is, that the logs broke said dam, and thereby caused the injury complained of. The right to float logs between certain points, would not justify their doing damage at the terminus. The same reasoning would dispose of the second point, provided there was a right by prescription between the same points, for, in the parts of the answer affected by the ruling on the demurrer, navigability is only claimed between Metzger's mill and Wood's farm, so we think the ruling on the demurrer can be sustained.

But the view which we have taken of the case renders these parts of the answer immaterial. We hold the law to be, that any stream in this state is navigable, on whose

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waters logs, or timbers can be floated to market, and that they are public highways for that purpose; and that it is not necessary that they be navigable the whole year for that purpose to constitute them such. If at high water they can be used for floating timber, then they are navigable; and the question of their navigability is a question of fact, to be determined as any other question of fact by a jury. Any stream in which logs will go by the force of the water is navigable. Such is the rule in Maine, where small streams are used to great advantage in bringing logs from deep forests to places convenient for use. (*Moor v. Veazie*, 32 Maine, 343; *Treat v. Lord*, 42 Maine, 552; *Brown v. Scofield*, 8 Barb. S. C. R. 243.)

Such is now the settled law in those states that have adjudicated this question. And we think it the rule that best accords with common sense and public convenience, for these rapid streams, penetrating deep into the mountains, are the only means by which timber can be brought from these rugged sections, without great labor and expense; and by their use large tracts of timber, otherwise too remote or difficult of access, can be rendered of great value, as the country shall grow and timber become scarce. The question as to whether the legislature has authority to declare a stream navigable, is not material here. There is no doubt but the legislature has the authority to regulate the navigation of these streams, and make provisions for passing dams and booms, and it will undoubtedly express its authority in this respect, as this matter shall assume more importance. As there is nothing before the court in this case, except the ruling of the court on the demurrer to the complaint, the court does not have before it the merits of the case, to ascertain on what grounds the verdict was found, or whether in fact the jury considered the question of the navigability of Mary's river, and we are not at liberty to go beyond the record; but I will here say, that if Mary's river is capable of floating logs from along its bank to the Willamette river, or to mills on its own banks, then it is a navigable stream.)

The judgment below will be affirmed.

Delay v. Chapman.

W. H. AND JOS. DELAY AND LANSING STOUT, APPELLANTS, v.
W. W. CHAPMAN, ADMINISTRATOR, RESPONDENT.

8	459
37	268

Appeal from Multnomah County.

DONATION LAW.—HEIRS.—Under the donation law of 1850, upon the death of a settler upon public lands before the expiration of four years continued residence, etc., all *his right* in such lands descend to his heirs, named in such law; and proof of compliance with the requirements of that law up to the death of the settler, entitles those heirs to the patent for the land; and such proof must be made by those heirs, or some one for them.

IDEM.—The right of such settler in such lands at his death was not an absolute fee—it was an estate which he could not convey or encumber by contract or devise, and was not available to his creditors, and not subject to his debts in any way; and this is the estate which under that law is cast upon the heirs.

IDEM.—HEIRSHIP.—PURCHASE.—Before a patent can issue in such a case, the heirs must make the proofs required—they must get the fee by their own act; and such an obtaining is by purchase, and not by descent.

IDEM.—The patent gives to them a different estate from the one possessed by their ancestor. They can encumber, alien or devise it.

ADMINISTRATOR.—In the estate thus acquired, or to be acquired, by the heirs by purchase, the administrator has no right or interest, and in this case has right to defend the action.

THIS was originally an action at law brought by the plaintiffs, who are appellants here, to recover possession of certain lands patented by the United States to the heirs-at-law of Joseph and Sarah Delay, deceased. The defendant, as administrator of the estate of James L. Loring, filed an answer in equity, defending as such administrator, and setting up that, under the donation law, the patent should have been issued to the heirs-at-law of the said Loring, who, in his life time, claimed the premises under the law aforesaid, and who died in January, 1853, and praying that the patent might be canceled. The appellants having filed a replication it was tried on the issue thus made and the evidence of the parties, and a decree rendered in favor of the defendant in accordance with the prayer in his answer contained. From this decree the plaintiffs appeal to this court. The evidence adduced shows, that James L. Loring,

Delay v. Chapman.

on the twelfth day of April, 1852, filed in the office of the surveyor general of Oregon, notice of settlement upon the land in question, under the act of Congress, approved September 27, 1850, granting donations to settlers upon public lands, and on the twentieth day of April, 1852, made his proof as required by the act; and that in the month of January, 1853, Loring died, before completing the four years residence, etc. On the third of February, 1853, letters of administration were issued upon the estate of deceased to the defendant. Four years after the death of Loring, March 10, 1857, the administrator made final proof of the settlement of deceased. Before the death of Loring, Joseph Delay and his wife, claiming that Loring had abandoned the claim, settled upon the land in controversy, and made the necessary proofs of compliance with the act of September 27, 1850. It appears by the evidence, that after a contest between Chapman, as administrator, and the Delays concerning the land, a patent was directed to be issued to the heirs of the Delays, which was accordingly done.

Page & Thayer, for appellants.

A patent, having been issued to a person, carries with it the presumption that all previous requisites of the law have been complied with. (9 Cranch, 87; 18 Howard, 87; 13 Pet. 450.)

The code, as well as the old equity rule, requires the real party in interest to commence a suit.

That Chapman has no interest in the premises or in this suit. No title had vested in Loring—none could vest—for the grant was upon conditions precedent to be performed. (2 Bac. Abr. p. 291, secs. 6 and 7, Don. Law.)

That the heirs of Loring would take as purchasers, and not as heirs. (2 Paine C. C. R. 584; 19 N. Y. 384-90; 2 Denio, 23; 4 Mason, 489.)

The rule in *Shelly's* case does not apply:

1st. Donation act changed the course of descent. (Deady, J., *Fields v. Squires*, pp. 32-35.)

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2d. The ancestor's estate was not a freehold. (Greenleaf's Cruise, vol. 4, p. 307; 4 Kent, 220.)

3d. Estate of ancestors and heirs are different. (15 B. Monroe, 282; 1 Curtis C. C. R. 419.)

The ancestor took only an equity. (5 Cranch, 191.)

The heirs, as purchasers, have an original title. (4 Kent, 216; Black Com. p. 243.)

W. W. Chapman and Mitchell, Dolph & Smith, for respondent.

An administrator has the right to the possession of the real and personal estate of the decedent. (Code, p. 334, sec. 10.)

Real and personal estate are chargeable with the debts and claims against the estate. (Code, p. 354, sec. 11 and 421, sec. 1,028.)

When personal property insufficient to satisfy same, the real estate is made subject thereto. (Code, 1855, p. 360, sec. 7; Id. p. 363, sec. 25; Id. 1862, p. 428, sec. 1,113.)

KELSA, J. The patent having issued to the heirs of Joseph and Sarah Delay, carries with it the presumption that all prerequisites of the law have been complied with by them. (9 Cranch. 87; 18 How. S. C. Rep. 87.) The defendant rests his right to the premises, and to have the patent canceled, on the ground that he is the administrator of the estate of Loring. If Loring had at the time of his death an estate in the premises that could be reached by creditors, or that was subject to be administered upon, then the defense is good, otherwise it fails. If there is a right in the heirs of Loring to the premises, and none subject to administration, *they* must be the parties in the suit to cancel and not the administrator. One of the rules governing equity proceedings is, that every suit shall be prosecuted in the name of the real party in interest, except that an executor or an administrator, a trustee of an express trust, or a person expressly authorized to sue by statute, etc., may sue without joining with him the person for whose benefit the

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suit is brought. (Civil Code, sec. 379.) Loring having died before the expiration of four years, continued possession required by the Act of Congress, the rights of his heirs depend on sec. 8 of the Donation Law (Code, page 88.) That section provides: "That upon the death of any settler before the expiration of the four years continued possession required by this act, all the rights of the deceased under this act, shall descend to the heirs at law of such settler, including the widow where one is left, in equal parts; and proof of the compliance with the conditions of this act up to the time of the death of such settler, shall be sufficient to entitle them to a patent." The rights the deceased had at the time of his death were limited by the 4th section of the Donation Law (Code, pp. 85, 86), which provides: "That all future contracts by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled to under this act before he or they have received a patent therefor, shall be void." (1) It is further provided in the 4th section, that, "in all cases where such married persons have complied with the provisions of this act so as to entitle them to the grant as above, provided, whether under the provisional government of Oregon, or since, and either shall have died before patent issues, the survivor, and children or heirs of the deceased, shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon." The deceased, at the time of his death, had no estate in the premises that he could convey or encumber by contract or devise, being prohibited by the above provision. The creditors of the deceased, in his lifetime, could not reach the land in any manner to secure the payment of their debts.

It is claimed on the part of the defendant, that Loring had in the land, up to the time of his death, a conditional fee, or estate in fee, liable to be defeated on failure to comply with conditions subsequent. Strictly speaking, and

1. The provision above quoted, was repealed.

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using words in their precise legal import, Loring did not have an estate in fee in the land liable to be defeated on failure to comply with conditions subsequent. Persons who have an estate of freehold subject to a condition, are seized, and may convey or devise the same, or transmit the inheritance, though the estate will continue defeasible. (4 Kent, 125.) It is a principle of law, that if the condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, either by the act of God, or of the law, or of the grantor, the estate of the grantee, being once vested, is not thereby divested, but becomes absolute without any act on the part of the heir. (4 Kent, 130; 2 Blackstone, 156, 157.) If the estate became absolute on the death of Loring (he being an unmarried man), then his heirs would take by descent, the law having cast the estate upon them immediately on the death of their ancestor. (2 Blackstone, 201, 202.) The 8th section of the Donation Law, provides that all the rights of the deceased under the act, shall descend to the heirs at law of such settler in equal parts; and also provides what proofs they, or some of them, must make before they get the fee. All the rights of the deceased, at the time of his death, in the premises, stopped far short of an absolute fee. Loring, as I have said, could neither encumber, alien, nor devise the land; nor could his creditors reach it for their debts. This is the estate which descended to the heirs of Loring, and nothing more.

It is claimed on the part of the plaintiffs, that the grant made by the fourth section, with the limitations contained in the eighth section of the donation law, creates an estate known in law as a conditional limitation; this position is also incorrect. A limitation marks the period which determines the estate, without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes to an end at once, and the subsequent estate arises. A conditional limitation is of a mixed nature, partaking both of a condition and a limitation; of a condition, because it

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defeats the estate previously granted, and of a limitation, because upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim. (4 Kent, 127; 3 Gray, 147; 2 Blackstone, 155-6.) It is a principal of law in respect to real estate, that the fee must at all times be vested in some one—an abeyance of the fee is against the policy of the law. (2 Denio, 350; 1 Hilliard, Real Prop. 53, sec. 46-7.) The estate of the grantee under the act, previous to the completion of the prescribed four years' possession, is peculiar to the donation law.

It is provided in the eighth section, that proof of compliance with the conditions of the donation law up to the time of the death of such settler, shall be sufficient to entitle the heirs to a patent. This proof must be made by the heirs, or by some one of them, and until that shall have been done, the heirs will not be entitled to a patent. If the heirs of Loring are entitled to the land, they obtain it by purchase and not by descent; for the reason that they get the fee by their own act. There are only two ways of acquiring real property—one by descent, the other by purchase. If a person does not take as heir, he takes by purchase; no matter how he acquires it. (2 Blackstone, 241.) By the proof of the heirs, as provided in the eighth section, and the issue of the patent to them, they acquire in the land a new, inheritable quality which the ancestor did not own. They can incumber, alien, and devise the land. (2 Blackstone, 243.) This new estate, which is by the patent grafted upon the heirs of the ancestor, and which they could not take by descent from him, they must take by purchase, or as grantees. When proof is made under the eighth section by the heirs, then all the rights of the ancestor, in the land, clogged and hampered as it was in the ancestor's lifetime, descends to the heirs, together with all the estate in the land, and their title becomes absolute. A new inheritance is grafted upon them, of which they are the root, and not their ancestor. Certainly the heirs get an estate which the ancestor never had; hence they take by purchase and not

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by descent. (15 B. Monroe, 314-15; 3 Washburn, Real Prop. page 6, sec. 4; Id. page 10, sec. 13.) If the heirs of Loring are entitled to the land, they acquire the title by purchase, and the defendant, as administrator, has no right, title or interest whatever in the land, and no right to defend this action.

The judgment of the court below must be reversed.

AMELIA COWENIA *et al.*, APPELLANTS, v. D. B. HANNAH
et al., RESPONDENTS.

Appeal from Multnomah County.

TREATY.—Article III of the treaty of 1846 between the United States and Great Britain, construed, that neither power intended in any way to dispose of the soil or embarrass the right of eminent domain.

TITLE.—That the only title during joint occupancy would be a mere possession, and would extend only to the land actually occupied.

DONATION LAW.—The act of 1850, called the donation law, makes no provision for one dying before the passage of the law—it only provides for persons *in esse*. Nor did that act enlarge possessory rights.

In this case the appellants claim six hundred and forty acres of land in Multnomah County. They allege that a British subject, William Johnson, was residing on this land prior to the treaty of 1846 between Great Britain and the United States, fixing the northern boundary of Oregon territory and terminating the convention of 1818, and that the third article of the treaty of 1846 gives these appellants, who claim under him, Johnson, a title to this land against the defendants, who have a patent to the same from the United States.

Demurrer to complaint sustained.

Stout & Shattuck, for appellants.

Article 3 of the treaty of 1846 was intended to give the land then occupied by British subjects, in accordance

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with regulations then existing in Oregon territory (4th sec. Don. Law). Congress considered the treaty as a *grant of land*.

The donation law respects such titles. (2 How. 591; 14 Peters, 353.)

First treaty was in 1818, and existed for ten years, and in 1827 was continued indefinitely, and the treaty of 1846 defined final position of rights.

Wait & Parrish, for respondent.

If the "possessory rights" of British subjects have not been respected, that fact gives them no right to the soil—such claims are adjusted in article 1, treaty of 1863.

Johnson would only in any event only have such property as he actually had enclosed.

What are possessory rights? (5 Wallace, 599; 6 Wallace, 663.)

British subjects had only an estate analogous to an *estate at will*.

The British subjects were here only by permission or license, and that would expire either by *removal of license*—by revocation—by expiration of the title of the licensor.

What is a license? (Wash. Read prop., p. 412; 11 Mass. 533; 7 Taunt, 374; 15 Wend. 380.)

The possessory rights of British subjects, pushed to the utmost extent, are only:

1st. Rights to the possession of the land actually occupied by them at the time of the treaty.

2d. Right to use the land at that time occupied, as they had been accustomed to use it.

3d. To maintain possessory action against trespassers.

A transfer of sovereignty does not disturb existing property rights. (9 Peters, 117.)

Possession can *never* confer title when it is permissive, but only when it is adverse. The legislature and judicial departments have sanctioned our construction of the treaty—by passing the land law—by extending the pre-emption laws—by judicial decision. (*Lounsedale et al. v. Parrish*, 21 How. 290.)

BOISE, J. The 3d article of the treaty of 1846 provides "in the future appropriation of the territory, south of the forty-ninth parallel of north latitude, as provided in the first article of this treaty, the possessory rights of the Hudson Bay Company, and of all British subjects, who may be already in the occupation of land or other property lawfully acquired within said territory, shall be respected." It is claimed that this language was meant to confer titles on the persons, named in this article as British subjects, having possessory rights to land within the territory; for, it is not a mere possession that is here asserted, but a fee simple title. If the treaty only conferred a mere right of possession, then, whenever that possession was abandoned by the occupant, it would cease. It would also determine with the death of the occupant; for a mere title to possession does not descend to heirs; and, if simply personal, cannot be assigned unless it be for a term. In determining this question, it is important that we look at the history of British occupation in this territory, prior to the convention of 1818, between the United States and Great Britain. The United States claimed the country drained by the Columbia river by right of discovery. Great Britain was also claiming the same right to it. The convention of 1818 by the third article provided as follows, to wit: "It is agreed that any country that may be claimed by either party, on the northwest coast of America, westward of the Stony mountains, shall, together with its harbors, bays and creeks, and the navigation of all rivers within the same, be free and open for the term of ten years, from the date of the signature of the present convention, to the vessels, citizens and subjects of the two powers; it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may have to any part of the said country, nor shall it be taken to affect the claims of any other power or state to any part of said country; the only object of the high contracting parties, in that respect, being to prevent disputes and differences among themselves." This article was extended in

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1827, and continued in force until the treaty of 1846, under which appellants claim title. I think it apparent from the language of this article, that it was the intention of the two nations, that neither should in any wise dispose of the soil, or in any way embarrass the right of eminent domain, during the continuance of the convention of joint occupancy, so that no title could be acquired, during that time, higher than a mere possession, and this possession would extend no farther than the land actually occupied.

The treaty of 1846, treated of these lands as they then were; and had the parties intended to raise these possessory rights to a higher title, it would have been so provided. I think these possessory rights would cease on being abandoned, so that the possessor became disseized by his own voluntary failure to occupy; or, on his death, as such rights would not descend to heirs; and further, I think that as Johnson died before the passage of the Act of Congress of 1850, September 27th, he was not one who could be provided for by that act, as that only provided for persons *in esse*. Nor do I think it was the intention of the Act of Congress of September 27, 1850, to enlarge the possessory rights, provided for in the treaty of 1846, but only to recognize them, to the extent that they had been granted, and to exclude those claiming under the treaty, from any benefit under the Donation Law; and all that class of persons, named in the treaty, would have been excluded without this provision, for they are described as *British subjects*; and none but native citizens, or persons who were naturalized, could obtain land under the act of 1850; and when a person becomes naturalized he is no longer a citizen of his former sovereignty, there is a change in his relations to his adopted country; and by the theory of our government he would cease to be a *British subject*. It was intended that such should not claim under the treaty, and also under the Donation Law; and a claim, under the latter, was a surrender of possessory rights under the treaty.

The judgment will be affirmed.

 Fassman v. Baumgartner.

JOHN FASSMAN, RESPONDENT, v. CHRISTIAN BAUM-
GARTNER AND ANNA SCHRANN, APPELLANTS.

Appeal from Benton County.

APPEAL.—JUDGMENT BY CONFESSION.—Sec. 526 of the Code provides that no appeal shall lie, in cases of judgment or decree, by confession or for want of answer.

APPEAL.—By an attempted appeal from a decree for want of answer, this court acquires no other jurisdiction over the subject than the power to dismiss such appeal.

At the November term, 1869, of the circuit court for Benton county, the defendants, appellants here, withdrew their answers, and judgment [decree] was rendered upon the complaint as upon failure to answer. The defendants afterwards gave notice of an appeal, and filed the usual bond, but failed to file a transcript in the supreme court by the second day of this term. The respondent Fassman brought a certified copy of the bond and necessary papers, and moved here for an affirmance of the judgment, with ten per cent. damages.

Strahan & Burnett, for the motion.

F. A. Chenoweth, against.

PRIM, C. J. Section 526 of the Code declares that "any party to a judgment or decree, other than a judgment or decree given by confession, or for want of answer, may appeal therefrom."

When a case is here upon a proper appeal, this court may take any action thereon authorized by statute. But this motion develops facts showing that this was an attempted appeal in a case in which the law admits of no appeal. The parties below were present in that court, and the defendants substantially failed to answer, and the decree was given for that reason.

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Beckley v. Learn.

There could be no appeal. This court could acquire no jurisdiction of the case, other than to dismiss the attempted appeal.

The plaintiff below might have treated the appeal as a nullity, and procured an execution at any time.

Motion is denied.

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3	544

HENRY BECKLEY, APPELLANT, v. M. M. LEARN, RESPONDENT.

Appeal from Douglas County.

FERRY.—Under the law of 1854, sec. 40, p. 868, a ferry license becomes a limited franchise.

IDEM.—At the expiration of any term of license, the owner of the lands, embracing the ferry landings, might assert his right to a preference to the grant of license, with the same effect as he might have done at the time of the establishment of the ferry.

At the April Term, 1864, of the county court for Douglas County, a license was granted to M. M. Learn, to keep a ferry over Umpqua River, known as Trenton Ferry, for the term of five years. At the February Term, 1869, of the same court, Learn applied for a renewal of his license for a term of five years. At the same time, Henry Beckley applied for a license to keep that ferry for five years.

The court found that Beckley was the owner of the land on both sides of the river, comprising the ferry landings, and that Learn had given no notice to Beckley of his intended application for a renewal of his license. The license was given to Learn, and Beckley's application rejected, and upon appeal to the circuit court, the judgment of the county court was affirmed, and Beckley appeals.

In 1864, when Learn obtained his license, and the ferry was established, one Mills was the owner of the lands on both banks of the river, but Mills failed to apply as such owner for the license. Mills in the meantime, had sold the lands and conveyed them to Beckley.

Beckley v. Learn.

Watson & Lane, for appellant, claim that the owner of the land is entitled to a preference in obtaining a license, and cite 3d Kent 554 (10th Ed.); Oregon Statutes, p. 869, sec. 42; 2 Oregon Reports, 220; 1 Oregon, 35; 18 Iowa, 336; 29 Cal. 458; 5 Cal. 47.

That unless the owner of the land fails to apply, no other person can obtain a license (2 Oregon. 238), and if he fails to apply, a former licensee, can, of course, obtain a renewal, or an applicant can obtain a license. (Code, p. 868, sec. 40.)

That the court had no right to grant any one a license before the expiration of the former license, without ten days notice to the owner of the soil. (Code, p. 869, sec. 42, 43.)

W. R. Willis, for respondent.

If the owner of land once waives his preference for a license, he has no interest, except as a citizen at large. (1 Oregon, 38.)

Granting and renewing licenses are entirely different. In the grant of a license, there must be a petition showing, to the satisfaction of the court, the necessity of a ferry, there must be notices, etc. These are not required in a renewal. (Code, p. 868, sec. 43; 5 John, Ch. R. 106.)

If notice was necessary to Beckley, he has waived it by appearing in the Court below. (1 Oregon, 341; 2 Oregon, 89.)

Mills, the assignor of Beckley, had failed to assert his preference, and his assignee had no rights saved to him over those of a citizen at large.

THAYER, J. We think that in the enactment of the law of 1854, sec. 40, p. 868, of the Code, the Legislature materially changed the character of ferry licenses as to their term. What before had been a perpetual franchise, and was so held in *Cason v. Stone*, 1 Oregon, 39, after 1854, became a franchise, limited to a term of five years. Both laws gave to the owner of the lands embracing the ferry landings, at the establishment of a ferry, a preference to a grant of license

Pittman v. Pittman.

if he applied. Under the law before 1854, if he failed to apply, then, he lost his preference *forever*, since a perpetual franchise had been vested in another. Under the present law, we think he loses his right only during the term of a license granted to another, upon his failure to apply therefor, and that at the expiration of a term of license, he may assert his preference, to the exclusion of every other person, including the former licensee. Our law makes a difference as to manner of application of a holder of a license for its renewal, and that of a new applicant. The latter is compelled to give notice, etc., but a *renewal* can be obtained without petition, or notice to the owner. Learn was entitled to a renewal of his license, if found to be a proper person, until Beckley appeared as an applicant for the license; and when the court found him to be the owner of the land, and a competent person, then Learn's application should have been denied, and the license given to Beckley.

The judgment should be reversed.

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WILLIAM M. PITTMAN, APPELLANT, v. EMILY C. PITTMAN, RESPONDENT.

Appeal from Benton County.

APPEAL—STATEMENT.—A cause will not be dismissed, of course, for want of a statement, or because the statement certified here is defective.

DECREE.—An order, made in a divorce suit, assigning the minor children to the custody of one of the parties, is in the nature of a decree, and is a subject of review on appeal under sec. 525.

APPELLANT obtained a divorce below, from respondent, on the ground of harsh and cruel treatment, but in the decree the court awarded the two minor children to the respondent until ordered otherwise. From this portion of the decree, he took an appeal. Respondent moves to dismiss the appeal on two grounds: 1st, there is no statement, and 2d, that such an order is not a subject of appeal.

Pittman v. Pittman.

Strahan & Burnett, for the motion.

Chenoweth & Williams, contra.

PRIM, C. J. The first question is upon the sufficiency of the statement, while it sets forth the facts, it does not contain the grounds upon which the appellant intends to rely. The law requires that the certificate of the attorney shall contain the particulars in which the judgment or decree is alleged to be erroneous. In addition to this certificate, by sec. 526, Sess. Laws, 1866, p. 12, if the appealing party desires a statement, it shall, when made, "contain the grounds upon which he intends to rely on the appeal, and so much of the evidence, as may be necessary to explain the grounds, and no more;" and shall be served on the adverse party. Our practice is not to dismiss cases for want of a statement, or for a defective one, since questions may arise in every case which require no statement for their full consideration here. The statement in this case is defective, and inoperative as such, but we overrule this point in the motion. The second question is, whether this case presents any judgment, order or decree, which we are permitted to review. Sec. 525, p. 280 of the Code, provides "a judgment or decree may be reviewed as prescribed in this title, and not otherwise. An order affecting a substantial right, and which in effect determines the action or suit, so as to prevent a judgment or decree therein; or a final order affecting a substantial right, and made in a proceeding after judgment or decree, for the purpose of being reviewed, shall be deemed a judgment or decree."

The appellant appeals from an order made, assigning the minor children of the parties in a suit for divorce, and made at the time of the decree. The pleadings in that suit show that an issue was made directly on the question as to the claim for and disposition of the children. That order gave them to the defendant below, with the usual provision as to the future power over them by the court.

McDonald v. Evans.

The law of marriage and divorce gives to the court full power over that subject, and oftentimes, that is the only contested question in such cases. The order of the court, we think, disposes of the children as though it were a divorce; and, so far as the invoking of the power of the court in that suit is concerned, is a final one.

In that view, it becomes a subject of review here under the section cited.

The motion to dismiss is therefore overruled.

JAMES McDONALD, APPELLANT, v. DAVID EVANS, RESPONDENT.

Appeal from Douglas County.

COSTS.—Construction of sec. 539 of the Code, as to when a party is entitled to costs.

IDEM.—Costs can in no action at law be awarded to both parties.

THIS action was commenced in the county court of Douglas county to recover the possession of certain personal property, viz: six head of cattle. The defendant recovered a judgment, which was removed by appeal to the circuit court. The complaint contains the usual allegations for such recovery. The answer controverted each of the allegations of the complaint, and alleged affirmatively that the defendant was the owner of said property, and, in the prayer for relief, asked for costs and disbursements; but neither claimed the return of the property nor damages for the detention thereof. Upon trial the jury found that plaintiff was the owner of one of the cattle described in his complaint, and that the same was of the value of \$25. They also found that the defendant was the owner of the other five head of said cattle, and that they were of the aggregate value of \$150. The court rendered judgment in favor of the plaintiff for the possession of one of the cattle, and in favor of the defend-

McDonald v. Evans.

ant for the others. The court below awarded to the plaintiff costs and disbursements to the sum of \$25, and full costs to the defendant to be taxed by the clerk.

Watson & Lane, for appellant.

Our statute provides for costs. (Code, p. 287 sec. 539.)

Costs allowed to defendant when the plaintiff is not entitled to them. (p. 287, sec. 541.)

A party entitled to costs is also entitled to disbursements. (Code, p. 288, sec. 543.)

W. R. Willis, Esq., for respondent.

Plaintiff could recover but \$25 costs. (Code, p. 287, subdiv. 5, sec. 539.)

Both parties are actors or moving parties. (Steph. *Nisi Prius* 2482.)

Defendant was entitled to his costs and disbursements herein. (How. N. Y. Code, 494; 6 Hill 353; 2 Wend. 637; 12 Wend. 285.)

THAYER, J. The only question here is as to whether one or both of the parties is entitled to costs. Costs in every case are awarded by provision of statute—at common law they were not allowed.

After a close examination of the statutes we have not been able to find any authority, in any case, for awarding costs to both parties. Had the plaintiff in this case proceeded only to recover the possession or value of his property, and not resorted to his provisional remedy; in that event, having recovered the possession of property of the value of \$25 only, he would have been entitled to \$25 cost only, and the defendant would not have been entitled to any costs whatever.

The statute provides (p. 204, sec. 259) that, "in an action to recover the possession of the personal property, judgment for the plaintiff may be for the possession or value thereof, in case a delivery cannot be had, and damages for the detention thereof. If the property had been delivered to the plaintiff,

McDonald v. Evans.

and the defendant claimed the return thereof, judgment for the defendant may be for a return of the property, or the value thereof, &c." Doubtless, under this provision, the defendant could recover any portion of the property proved on the trial to be his: provided, he claimed a return thereof in his answer. In this case he has made no such claim, and would be entitled to no such relief. In case, however, the plaintiff should retain the property after the termination of the action, defendant's remedy would be by action on his part. (5 Denio, 21.)

By the revised statutes of New York, both parties, under certain circumstances, may recover costs in the same action. (2 Denio, 188.) But it will be seen that costs cannot be awarded in that state, when the action in its nature is entire; and in no event will they be allowed, except under the provisions of the statute referred to.

In justice, the defendant, in the case at bar, might be entitled to costs, but unfortunately for him, we have no statute which so permits and this court cannot legislate. Under our statutes, costs are only allowed of course, to the defendant, when the plaintiff is not entitled to costs, p. 287, sec. 541. In this case, plaintiff being entitled to costs, this defendant cannot be. In a similar case in Massachusetts, costs were allowed to both parties. This decision, however, must have been made under some peculiar provision of their statutes, as it could not have been made under any common law provision for the reason before mentioned, that at common law neither party was entitled to costs. (*Burrill Law Dic.* title "costs.")

Judgment reversed.

Banks v. Crow.

THOMAS BANKS, RESPONDENT, v. S. H. CROW, APPELLANT.

8 477
86 491*Appeal from Douglas County.*

JOINDER OF ACTIONS.—A contract was alleged to have been made to convey to the plaintiff "a certain farm, a certain town lot, and twenty hogs" for the consideration of eight hundred dollars, and in an action brought thereon, the complaint averred that a deed had been executed for "a part only of the real property," and that there was a refusal to deliver the hogs, and that the plaintiff had been damaged thereby in the sum of \$180: *Held*, that the complaint set up but one cause of action.

SALE OF LAND.—**PAROL.**—Respondent was called as a witness to prove the contract: *Held*, it was error to admit parol evidence of the contract for the sale of land.

SEVERABLE CONTRACTS.—A contract to sell a farm, a town lot, and certain personal property for a gross sum, is not a severable contract.

VARIANCE.—If the plaintiff seeks to recover on a contract essentially different from the one set up, he should obtain leave to amend.

WITHDRAWAL OF PART OF CAUSE OF ACTION.—The verdict by the jury was, "We, the jury find that the town lot in the town of Oakland, Douglas County, Oregon, designated in the plaintiff's complaint, is the property of plaintiff, and further, we, the jury, find for the plaintiff ninety-four dollars:" *Held*, that the town lot had not been withdrawn from the case, and its sale forming a part of the parol agreement, rendered the contract void.

THE complaint charges that the defendant agreed with the plaintiff for the consideration of \$800, to sell and convey to the plaintiff a certain farm described in the complaint, a certain town lot also described, and twenty hogs designated—that the said sum has been duly paid to the defendant in gold coin; that defendant has executed a sufficient deed "to a part only of the real property," and has refused, and still refuses to deliver the hogs, and that the plaintiff has been damaged \$180 by the refusal to deliver the hogs.

The answer denies making the alleged agreement, and charges that the defendant agreed to sell the farm and the hogs to the plaintiff for \$800, and that he has fully performed and complied with the terms of the agreement, and has delivered the said hogs. At the trial the plaintiff appeared as a witness, and was asked to state the terms of the contract.

Banks v. Crow.

Objection was made that the contract, being for the sale of land, could not be proved by parol. The witness was permitted to answer, and this ruling being excepted to is assigned as error. Afterwards, in the course of the trial, the plaintiff announced that he abandoned all claim for damages as to the town lot, and he now claims that the error, if there was any, in admitting parol evidence of the contract, is waived or cured by the abandonment, and that the whole case as it now stands shows that the error does not affect a substantial right of the party.

W. R. Willis, for the appellant.

When the terms of an agreement have been reduced to writing, it is to be considered as containing all those terms, and no parol evidence of the terms can be admitted. (Code, p. 317, sec. 682.)

If the consideration is single and entire, the contract is, and cannot be divided. (8 Johns. 25; 5 Wend. 164; 2 Parsons Con. 519; 22 Pick. 457-60.)

Part performance will not take it out of the statute of frauds. (10 N. Y. 232; 5 Cowen 162; 2 John, 221; 20 Pick. 134, etc.)

The plaintiff's remedy was an action to recover back the money paid, disaffirming the contract.

The price of the hogs and town lot being a part of an entire contract, cannot be fixed by parol evidence.

Watson & Mosher, for respondent.

An agreement void in part, is not necessarily void *in toto*. It is universally held that no one can receive or enjoy the goods or services of another, and then rely on the statute of frauds as an excuse for not paying for them. (13 Ind. 1-11; 28 Ver. 34.)

The contract was fully completed on the part of the plaintiff. Equity will not allow the statute of frauds to be assigned as a reason why it should not be performed as to the other. (22 Ill. 63; 7 Ohio, 157; *Silget v. Corson*, 26 Missouri.)

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The rigid rules of law as to the statute of frauds, and the indivisibility of contract, is greatly relaxed by modern decisions. (23 Ver. 497; 28 Ver. 558.)

UPRON, J. It requires no argument to show that parol evidence was inadmissible to prove the contract set up in the complaint. The position assumed by the respondent is, that the case may be treated as if no mention had been made of the town lot; that the contract being for the sale of a tract of land and certain personal property, and the land being conveyed, and thereby that part of the contract required to be in writing being performed, the statute of frauds does not apply. He cites *Irvin v. Stone*, 6 Cush. 503; *Rond v. Micher*, 11 Cush. 1; *Davenport v. Mason*, 15 Mass. 85; *Benedict v. Beebe*, 11 John, 145; *Wilson v. Ray*, 13 Ind. 1; *Pierce v. Paine*, 28 Ver. 34, and states the rule to be, "An agreement void in part is not necessarily void *in toto*, but a part, which would not be void if it stood alone, may be held valid if it can be separated from the part which is void." If we reject all that is said of the town lot, and treat of the farm and personal property only, this rule may be applicable to the case before us, especially if the farm was conveyed at the time of making the parol contract. A contract which is not severable, if void in part is void in whole. In the case supposed, one gross sum \$800, is to be paid for both the farm and the personal property.

But it is said the farm being conveyed, and it having become immaterial what part of the \$800, applied to purchase the personal property, since it was the surplus above paying for the farm, be it more or less, and was already paid over, nothing of the contract remains to be performed but the delivery of the hogs. From this it is assumed that the agreement to sell the personal property is severable, and stands as independently as if the agreement had been to sell the farm for \$700 and the hogs for \$100. In other words, the claim is that the land has been conveyed to the plaintiff by a deed, which is a compliance with the statute requiring

Banks v. Crow.

a writing; the personal property has been fully paid for, and therefore it can never be material to determine how much of the gross sum is apportioned to the one or the other; that in case of non-delivery of the personal property, the remedy is by an action for the damages occasioned by the failure to deliver, and the amount of damage is in no way dependent upon the price paid.

The case thus stated may be a stronger one, than where the land and personal property are bargained at the same time, the one at one price, and the other at another price; because, in the latter case, some advantage in purchasing both together, or an anxiety to obtain the land, may be the leading and main inducement to promise to pay the agreed price for the personal property, and that may be a reason why the contracts should not be deemed severable. But it is not rendered certain by the record in this case, that the deed was executed at the time of making the agreement for the sale of the land and the personal property. If the deed was not executed then, there was for a time an agreement that was in part void by the statutes of frauds, its parts were not then severable, and it was then material to know how much of the gross sum of \$800 should apply in payment for the hogs, to enable the purchaser to have the benefit of that part of the contract, without enforcing the part that was unquestionably void. Whether we conclude from this record that the deed was not, or was, made at the time of entering into the contract declared upon, the respondent's agreement is based upon the position, that the case stands here as if the town lot had not been mentioned in the complaint. In order to a fair consideration of that question, it should be observed that the lot was a matter upon which the jury were permitted to deliberate. The court charged the jury as follows: 1st. "If the jury believe from the evidence, that at the time the contract was made, the defendant then and there delivered a deed for the real estate mentioned in the contract to the plaintiff, and that a part of the purchase money was then and there paid to the defendant; and if they further believe from the evidence, that by virtue of said contract, the plaintiff was to

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receive a number of hogs, the consideration of which was paid by plaintiff, and the hogs were then on the premises and could be identified by marks and numbers from all others; then they must find for the plaintiff." 2d. "If you believe from the evidence, *that the town lot was not included in the contract*, and it was so understood by the plaintiff and defendant, and formed no part of the consideration for the purchase money for the land and the hogs, then the lot must be regarded out of the case." 3d. "If the jury find that *the lot was not mentioned* at the time the contract was made, the plaintiff cannot recover."

Court refused defendant's request to charge: 4th. "If the jury find that the defendant delivered the hogs with the land, then the verdict must be for the defendant." 5th. "If the jury find that the contract for the price of the land and town lot, and the hogs mentioned in plaintiff's complaint was one entire contract, and for one and the same consideration, the plaintiff cannot recover here."

The jury returned the following verdict, "We, the jury, find that the town lot in the town of Oakland, Douglas County, Oregon, designated in the plaintiff's complaint is the property of plaintiff, and further, we, the jury, find for the plaintiff ninety-four dollars."

It is evident from this charge and verdict, that proper steps were not taken to divest the case of the peculiar character given to it by the allegation, relative to the town lot. The more satisfactory way to accomplish that, would have been by application to the court for leave to amend the complaint. By the authorities before cited, a party may be allowed to withdraw a distinct cause of action without a formal amendment, but what is alleged in regard to the town lot, was not set up as a distinct cause of action—in fact, the complaint sets up but one cause of action, Code, p. 91, sec. 3, and it was not regarded by the court as a case where the variance between the allegations and proofs was to be disregarded as not affecting a substantial right. If it had been, the judge, instead of leaving it to the jury to say

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whether the contract embraces the town lot, would have instructed that the allegations in regard to the town lot were deemed withdrawn, and that the jury were not to consider that subject. It is clear from the record, that the respondent relied upon the illegality of the contract, set up in the complaint, and that the case was submitted to the jury embarrassed with questions, connected with the alleged sale of the town lot, liable to confuse the case, and divert the minds of the jury from the issue that would have been properly before them, if the complaint had been amended by striking out what was alleged in regard to the town lot. Error will not be presumed, but that the case was thus improperly encumbered appears affirmatively in the charge and verdict. I think it would be inconsistent with safe or desirable practice, and against precedent, to disregard the void contract set up in the complaint, and allow the plaintiff to prove a legal contract, different in an essential particular from the one charged. I also think that the court erred in refusing to instruct that "if the defendant delivered the hogs with the land, the verdict must be for the defendant."

This action was for breach of a special contract to sell and deliver. There was some evidence tending to show that the hogs had been delivered in pursuance of the contract proved, and the question of delivery should have been left to the jury.

The judgment should be reversed.

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28	383

C. A. WILSON, APPELLANT, v. THE CITY OF SALEM,
RESPONDENT.

Appeal from Marion County.

COSTS.—Bill of disbursements, how constituted, nature of objections thereto.

THIS case was an appeal from an allowance of disbursements to respondent, and invokes no questions other than those decided in *Crawford v. Abraham et al.*, 2 Oregon, 163, and requires only an extension of the rulings there.

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Williams & Willis, for appellant.

Mallory & Shaw, for respondent.

WILSON, J. In preparing the bill of disbursements, which one party claims to recover of the other. Each item is a *separate claim*, for which a *separate* allowance might be asked, and each item should be briefly, but particularly set forth, just as in a complaint. Each *cause of action* must be specifically set out, and must of itself, show a right to recover thereon; applied to this case, the reason is apparent. The opportunity must be given for the other party to object to the allowance, and by the rule in *Crawford v. Abraham et al.*, 2 Oregon, 163, he must object specially to each claim or distinct part thereof set forth. If this be not done, that item or part is admitted to be a proper charge.

The attendance of a witness is an item, the mileage of that witness is another, the necessity for his attendance a third, and to each, the party charged may or may not object. By our rule, in the case referred to, "when objections have been specially made to any or all of the items claimed, then it would be proper, if within the power of the claimant, to make a full showing as to the materiality," and we may add, to the necessity of each item so objected to. We there declared that the further showing should be in the form of an "amended verification." This term may have misled parties, and we would adopt rather an "*amended verified statement*." Each item or part thereof, objected to, should *only* appear in such amended statement, with all the facts necessary to show the justice of the claim, and to authorize the clerk or the court, to allow a judgment therefor. Here seems to have been the difficulty in this case. Perhaps a case would better illustrate what we desire to express. Suppose objections are made thus: That A. B. was not sworn as a witness, that C. D. did not attend as a witness *only*, but was a juror, etc., or for the alleged number of days, and that E. F. did not travel any distance as a witness, etc.

Schirott v. Phillippi.

Then the amended statement should directly and fully exhibit the facts as to those points, and might be in a form substantially thus: "The reason why A. B. was not sworn was (setting it forth); but it was material to have such witness in attendance (setting forth the reason); that C. D. travelled — miles in coming to and — miles in going from court as a witness. That said witness came by special agreement, or by process served; and that E. F. was in attendance as a witness alone — days." And so, as to any item, to which objection may have been made. Then perjury could probably be sustained if the facts sworn to were untrue, since the particular attention of the affiant has been called to each fact.

The case now before us is somewhat uncertain in what may be termed its pleadings, but it answers sufficiently for our views, additional to those in *Crawford v. Abraham et al.*

We think attorneys can now understand the requirements of our rulings. We find that no sufficient showing has been made to sustain the allowance of some of the items to which the appellant objected, and without specifying them we shall direct a modification of the judgment below, reducing the disbursements allowed to one hundred and fifty-one and $\frac{9}{10}$ dollars.

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SCHIROTT & GRONER, APPELLANTS, v. PHILLIPPI &
COLEMAN, RESPONDENTS.

Appeal from Multnomah County.

WRIT OF REVIEW.—THE STATUTORY APPEAL and writ of review are concurrent remedies.

IDEM.—The appeal involves a trial both upon the merits and upon the law; the review, only questions of law.

IDEM.—The expiration of a right to appeal as to time, does not extinguish the right to review,

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PLAINTIFFS, in a civil action, in a justice's court, against one Morst, had procured his arrest. Respondents here, defendants below, executed an undertaking, and procured the discharge of Morst from arrest. After judgment against Morst, and after execution against his property and a return of none found, an execution was issued against his person, which was returned not served, as Morst had left the state. On the twenty-fourth of March, 1869, appellants brought an action against the respondents on the undertaking, and on the twenty-sixth day of April, 1869, the justice gave judgment for the defendants, assigning as ground therefor, no cause of action. On the second of June, appellants filed a petition for a writ of review, and an allowance was made. On the fourteenth of June, in the circuit court, respondents' counsel moved to strike out and quash the writ. The court below sustained the motion, and filed his reasons, to which ruling the appellants excepted and took an appeal here.

Kelly & Reed, for appellants, assign as error:

1st. That the court decided that a writ of review would not lie, but that plaintiff's remedy was by appeal.

2d. That the court decided that a writ of review would not issue at any time within six months from the date of the decision complained of.

3d. That the court decided that the writ ought not to issue upon the facts stated in the petition.

4th. That the court decided that an appeal was a plain, speedy, and adequate remedy for errors in law, appearing upon the face of the proceedings.

5th. That the court decided that an appeal, and a writ of review were not concurrent remedies, and the plaintiffs could not elect which they would pursue.

6th. That the court decided that a writ of review would not lie, after the time for taking an appeal had expired.

O. P. Mason, for respondents.

WILSON, J. In dismissing the writ below, that court seems to have decided these propositions, that appeal and

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review were not concurrent remedies, that when an appeal could be taken a review would not be allowed, that after the time for taking an appeal had expired, when it might have been made available, it would be too late for a party to resort to a review.

By section 572, p. 294, of the Code, the writ, heretofore known as the writ of *certiorari*, is known in this code as the writ of *review*, and the next section declares "that any party to any process or proceeding before or by any inferior court, etc., may have the decision or determination thereof, reviewed for errors therein." This is substantially the law as it was in 1860. At the December Term, 1860, of the supreme court of this state, the same question was before that court, as is now here. In *Blanchard et al. v. Bennett et al.*, 1 Oregon, 329, the court held, "a *certiorari* may have been a proper remedy, and so may have been an appeal; the statute regulating appeals from justices of the peace allows appeals in all cases, etc., (Laws of Oregon, 1854, p. 295, sec. 185.) I therefore conclude that appeals lie in all cases from the final decisions of justices of the peace, and the remedy by *certiorari* is concurrent." When the writ of review was substituted for that of *certiorari*, it was subject to the same construction and application. The only difference in the law is found in sec. 575 of the Code, which was not distinctly found in the law of 1854. That declares that the writ of review "shall be allowed in all cases where there is no *appeal*, or *other* plain, speedy, and adequate remedy, and where the inferior court officer appears to have exercised such functions erroneously, etc."

When a party complains *only* of the errors in law appearing upon the record and proceedings, it is certainly not a plain, speedy or adequate remedy to force him to rely upon an appeal, which, under sec. 536, subdiv. 3, p. 285, of the Code, requires the same proceedings as though the case had been commenced in the circuit court, involving witnesses and a multitude of costs and disbursements, instead of having the pure questions of law, governing the case, heard and decided with comparatively no trouble or cost.

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The circuit judge, in allowing the writ, passes to some extent upon whether the causes alleged are errors of law or not, and if they involve more than legal questions, it might be proper to deny the writ and leave the party to his appeal, as the mode by which all the questions of law and fact may be retried. In review, everything is tried and decided from an inspection of the record, and an appeal cannot accomplish this without imposing a great incumbrance of other matters. Evidently the legislature intended this construction, for in sec. 116, p. 604, of the act relating to courts of justices of the peace, distinctly withdraws the operations of the sec. 64, p. 595, which gives an *appeal* in *all cases* from such court, except in three cases mentioned, in these words, "No provision of this act in relation to appeals, or the right of appeal, in either civil or criminal cases, must be construed so as to prevent either party to a judgment, given in a justice's court from having the same review in the circuit court, for errors in law appearing upon the face of such judgment, or the proceedings connected therewith, as provided in title 1 chap. VII," which is the law in reference to review. Taking the two laws together, and the reasons which operate in allowing the writ of review, we think that a party may have a right to a writ of review for *errors* in law apparent upon the record, etc., at the same time that he might have a right of appeal, which would retry the merits of the case as well as review the questions of law; that review and appeal may thus be concurrent remedies; and it follows then, that the expiration of a right to appeal, as to time, does not extinguish the right to a review. The one cuts off all possibility of having the case reheard upon its merits; but if the law, apparent from the papers, forbid such a judgment, then the judgment may be reversed or modified as to the mere questions of law at any time during the limit assigned for review. We think the judgment should be reversed and remanded.

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L. HOWE, APPELLANT, v. DOUGLAS COUNTY.

Appeal from Douglas County.

FEES.—MILEAGE.—Construction given to secs. 14, p. 738; 15, p. 739; 33, p. 903; and 35, p. 905, with reference to fees and constructive mileage.

IDEM.—Single mileage for each precinct, only allowed for serving notices upon the judges of election.

FEES.—What mileage allowed in serving the panel of jurors with notices.

FEES.—NOTICES.—No mileage allowed for posting notices for collection of taxes.

SHERIFF'S MILEAGE.—Sheriff's mileage commences at his office at the county seat.

THE plaintiff, appellant, as sheriff of Douglas County, from August 1st, 1866, to July 1st, 1868, averred that he performed certain services for which that county were liable to pay him, and set forth his claims thus:

Writing 84 notices for collection in each precinct, for the years 1866-7	\$ 21 00
Posting the same	42 00
Mileage to and from, posting the same	445 20
Mileage to and from each precinct, to collect taxes for the years 1866-7	142 00
Serving venire of the 3 panels of jurors for May term C. C. 1868	45 00
Writing notices of same	7 75
Mileage on same	67 60
Return on same	7 75
Mileage for serving subpoenas on 32 witness before grand jury	83 40
Mileage in serving 42 notices on judges of election, at the June election, 1868	331 00
Mileage in posting 42 notices of election for June election, 1868	331 80
Total	\$1536 00
And admitted a payment of	291 60

The answer denied any services for the county, except as stated in answer, thus putting in issue each averment of the complaint. It admitted service of venire of one panel of jurors and alleged payment therefor in the sum of \$15. For serving said venire for May term of court, 1868, writing notices of same, return and mileage, the defendant paid plaintiff all he was entitled to, \$50.25. For subpoenaing 32

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witness for grand jury full payment is averred in the sum of \$43. For serving 42 notices upon judges for June election, 1868, a payment is averred in the sum of \$98.80, which defendant alleges "was accepted in satisfaction of service" by plaintiff.

For serving 42 notices of election, a similar payment, 98.80, and acceptance is averred, and the defendant declared that all the mileage for serving said notice of election, and upon judges, did not exceed 1,976 miles, and that the amount paid therefor, fully discharged the same.

No replication was filed.

Upon the trial, the issues tried were submitted to the jury. for special findings, and their verdict was as follows:

We, the jury, find that the plaintiff actually traveled as follows:

	<i>Miles.</i>
For collecting taxes for 1867.....	315
For serving notices upon judges of election (total).....	307
For serving notices on one panel jury, May term, 1858.....	204
Posting notices (tax) 1867.....	309

Total number of miles actually traveled in performing all the above mentioned services.....1,134

We, the jury, find that the plaintiff traveled, actually and constructively, as follows:

For collecting taxes for the year 1867, and serving notices on judges of election for 1868.....	4,464
Serving notices on one panel of jury for May term, 1868.....	1,412
Posting tax notices for 1867	4,420

Total number of miles as actually and constructively traveled in performing the above service.....10,316

(Signed)

WM. VICKERS, Foreman.

Upon this verdict, the court found the law to be with the defendant, and gave judgment against the plaintiffs for costs, etc.

Plaintiff appealed from that judgment, setting forth as the ground of error, in his notice of appeal:

"1. The court erred in refusing to admit the evidence offered by the plaintiff as to the writing and posting of

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notices for the collection of taxes, as appears by the bill of exceptions filed and made a part of the record in said cause.

"2. The court erred in rendering a judgment against plaintiff, in favor of defendant, for its costs and disbursements.

"3. The court erred in not rendering a judgment in favor of plaintiff, against defendant, for the sum of \$740.60."

Willis & Watson, for appellant.

Strahan & Burnett, for respondent.

WILSON, J. As the appellant filed no bill of exceptions, we must confine our examination of this case to the second and third grounds alleged to have been error; and, in fact, from the verdict of the jury, it seems that the only issue tried was whether the appellant was or was not entitled to constructive mileage for certain alleged services. As in the case of *Crawford v. Abraham*, 2 Oregon, 163, this court is to give a construction to certain sections in the code, and thus establish a certain rule, which shall operate alike in the different counties of this state. We are aware that great differences of opinion exist as to the true meaning and operation of such sections, and that the different county courts have applied the law in their varying discretions.

This case exhibits but a few of the questions that have arisen in the different districts under the fee bill, and we regret that we cannot now give a full construction to that law, which should cover all those matters. The sections mainly calling for construction here are these:

Sec. 14, p. 738: "Every officer or person whose fees are prescribed in this act, who shall be required to travel in order to execute or perform any public duty, in addition to the fees hereinbefore prescribed, shall be entitled to mileage at the rate of ten cents per mile, in going to and returning from the place where the service is performed."

Sec. 15, p. 739. Mileage for any service by sheriffs, shall in all cases be computed from the county seat or place

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of holding court in the county in which the officer performing the service resides, etc.

Sec. 31, p. 903. That the sheriff of each county shall be tax collector thereof.

Sec. 32, p. 904—*Proviso*. The sheriff, before entering upon the duties of collector of taxes, shall execute an additional bond in such sum as the county court of the county may direct.

Sec. 33, p. 905. It shall be the duty of the sheriff upon receipt of the tax roll from the county clerk, immediately thereafter to give notice by posting up written or printed handbills, three in each precinct within his county, to the effect that he, or his deputy, will attend at the usual place of voting in each election precinct in his county, for the purpose of collecting taxes, etc.

Sec. 35, p. 905. The sheriff shall be allowed three per centum on all taxes collected by him, etc., which percentage shall be paid by the county.

It will be seen that sections 14 and 15 cited, undertake to declare the persons to whom mileage shall be allowed and the rate thereof, and the manner of compensation thereof as to the beginning and ending of travel. There is no general provision found elsewhere in the Code applicable to the mileage of a person whose fees are not named and fixed by chap. 18, in which these two sections are found. Other laws either provide specially for such compensation, or by their silence, lead to the conclusion that none was to be given.

By section 31, cited, a new duty is imposed on the person who may happen to be sheriff; he is made tax collector—is compelled to give a new bond, wholly different from his official bond as sheriff—and nothing is said in chap. 18, commonly called the fee bill, as to any fees as such tax collector. His office was created at the same time with the passage of the fee bill, but made no reference to it, and under said section 31, he has to perform certain duties invoking the necessity of traveling. That duty, however, abridges the necessity for far more extended journeyings, in

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that, by posting such notices as are required, the tax payers are obliged to wait upon him in paying their taxes, instead of his waiting upon them. Section 35, as cited, provides the compensation which the tax collector is to have, and the act of which it is a part undertakes to fully define the duties and liabilities of such officer. We think it was intended by the Legislature that the allowance of compensation should cover all the expenses and labor he might incur or perform in collecting taxes. He is not in such capacity a person included in and provided for in sec. 14 of chap. 18. The Legislature provided that by a less amount of travel, he could obviate the necessity of a greater, and by a gross amount of percentage indicated their intention of making that a full compensation. Upon the first and last points in the special verdict, we think the court below found correctly as to the law.

The question as to posting notices of election does not seem to have been submitted to the jury, probably from inadvertance; for, if the duty of serving notices of appointment upon judges of the election, could carry mileage, certainly that of posting notices of the election in each precinct is equally meritorious. Our decision, however, of the one, will be an indication of the construction on that point, upon which county courts may hereafter act.

Sec. 14, giving the right to mileage, applies its privileges to witnesses and sheriffs alike. Their fees are contained in the same act, and in similar cases, should have similar allowances. This court held in *Crawford v. Abraham*, our rule to be thus: "The claim for disbursements must be for the number of miles actually traveled, and in the number of days in actual attendance as a witness only," and as a rule still further delineating the rights of a witness, that "in two or more cases between the same parties, at the same term, a witness would be allowed but single mileage and attendance, etc." The full force of those rules does not apply here, but the intention there manifested is plain, that the claim must be for the number of miles actually traveled, and serves some purpose in guiding our findings here.

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Sec. 14 we think means this, if in executing a public duty an officer, of that class of persons provided for, must necessarily travel any distance, he is to be allowed ten cents per mile for his actual going to and returning from the place where he executes that duty. And we think that section 15, read in connection with section 14, provides in the case of the sheriff, that no matter where he may be when a process is put into his hands, he may in estimating his mileage count from the county seat. This evidently arises from the fact his office is there by law, and he is supposed to be present there ready for any business connected with that office. That is his official home and the Legislature intended his official travel should begin there.

Applying this construction to the case under consideration, the notice to the judges in each precinct is required. It is one act in which the county is the sole party made liable. In fact the notice to be served is but a single paper on which the returns must be made. While in the precinct the sheriff is where the three persons live who are to be served, and it is supposed he executes his duty speedily and carefully. He travels but once, with a single paper in his possession, sent by but one party, and following the spirit of our ruling, as cited, we think the law does not intend to pay him for labor which he does not perform. The services of no one can be required without just compensation, but unless plainly provided for, that which requires no service, no outlay of labor or expense, is not a claim upon which we ought to give an unusual construction to the law. We think the sheriff could claim his mileage for serving the notice belonging to, or necessary to be served in each precinct from the county seat, to the residence of the farthest one named in such notice, to be served. No evidence is here to show other than the truth of the finding of the jury, as to the actual number of miles traveled by appellant, and certainly the amount alleged to have been paid him by respondent, more than covers the claim due upon verdict.

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The jury very properly found that the appellant served a venire of but one panel of jurors, and found the miles actually traveled in executing that service, and from that finding we think the court paid appellant all he should be entitled to receive. The constitution of the statute must be made in subordination to the rules so long known and well established, and to that construction the court must bring an exercise of common sense and reason. Suppose the sheriff has a venire for a panel of jurors, in a single process of paper, and it turns out, as may happen, that ten jurors live in the same part of the county, say fifty miles from the county seat. At furthest, three days are sufficient to serve them and make return. He may travel enough additional miles in going to each juror to make the whole distance traveled 120 miles. For this he receives an allowance under our construction, of twelve dollars, besides the serving of venire on each juror. If he were entitled to have a mileage for each man served, as is claimed in this case, the number of miles so claimed, could not be less than 1,000; and then his three days' labor would realize him about \$35 per day. We know hardships may arise on either hand; but we find no analogous case in the statutes in which any other officer or person has such extensive rights as are claimed by appellant. On the contrary, the constitution of Oregon and the Legislature, have sought to obtain services in almost every other office at low rates therefor. Were we to give the construction claimed by appellant, the counties of large territory in this state would become hopelessly involved, and such result is manifest in this case.

The jury found that the sheriff actually traveled, in executing the duties specified in items two and three, 511 miles, which, at ordinary rates, would call for an allowance of \$51.10, exclusive of the fee for serving. We may fairly presume that those services could have been made within nine days. Under the second part of the verdict, upon the same claims and the number of miles is 5,896, calling for an allowance of \$589.60, exclusive of service; in the one case about six dollars per day, and in the other about sixty-six.

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The Legislature has left it to some extent uncertain as to the proper construction of sections fourteen and fifteen taken together; but we incline to that view which is most in consonance with equality and right, and with the intention manifested in the economical character of our constitution and laws. If the Legislature had expressly provided for, or made it apparent, that the better construction should have been in favor of the constructive mileage claimed by appellant, we should then have been constrained to hold differently.

Under our construction, we think the court below was correct in its holding the law to be with the defendant, and we affirm this judgment.

T. CROSSMAN, RESPONDENT, v. HENRY LANDER, APPELLANT.

Appeal from Douglas County.

COSTS.—The pleadings show a charge and a denial of wrongful entry upon premises in order to remove a house, a claim and denial that the house was built upon lands to which at that time, the parties were conflicting claimants under the homestead law: *Held*, that these allegations put the question of title directly in issue, and under sec. 531, subdivision 1. of the Code, would give costs to the plaintiff, though he recovered less than fifty dollars by the judgment.

ITEM.—If the house was not real property, the defendant should have made such a case in his pleading.

CROSSMAN brought this action to recover damages from Lander, for an alleged trespass, averring that Lander entered upon respondent's premises wrongfully, and removed therefrom a house. The appellant's answer admitting the entry, denies its wrongful character, and claimed property in the house, averring that he built the house upon premises, to which these parties were contesting claimants under the land laws of the United States. The replication denied

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a contest, and averred that appellant never was a claimant of those premises.

Upon trial below, the plaintiff had a verdict for \$20. The court gave judgment therefor, and for costs and disbursements of \$40.70 for plaintiff. Appellant claims that he was entitled to judgment for costs, etc., and that there was error in this respect.

W. R. Willis, for appellant.

Chadwick & Webster, for respondent.

WILSON, J. The law applicable to this case, and under which each of these parties claim to be right, is found in section 539, subdivision 1, of the Code. "In an action for the recovery of the possession of real property, or where a claim of title or interest in real property, or right to the possession thereof arises upon the pleadings, or is certified by the court to have come in question upon the trial." If a case exhibits either of these conditions, the plaintiff is entitled to costs, and this would carry a recovery of disbursements.

The single issue raised by appellant is, that no claim of title or interest in real property, or right to the possession thereof, arises on the pleadings. The answer admits an entry upon the premises, but denies that the same was wrongful, and the issue of the right to enter upon real estate is clearly made. The answer further avers that the house in question was built upon the land by defendant, at a time when the two parties were conflicting claimants to the same parcel of land under the homestead law.

The reply puts this question of title to the land as conflicting claimants in direct issue, and carrying with that question all matters properly connected with the land. Whatever is annexed to the freehold is real estate, and a controversy concerning any such article involves a question of title under the Code.

Title embraces the right to the possession, and every thing but the mere naked possession, 8 Barb. 569. If the

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defendant was not a conflicting claimant of the title to the land, then the claim he made to the house had no pretended existence, and was not even a shadow of one. So far as the pleadings show, the house in question must be supposed a part of the premises, and if defendant sought to make the question turn upon the quality of property, whether personal or real, the answer should have made a case, showing that the building was one which did not belong to the premises as a part thereof. An outgoing tenant by law may remove certain buildings and appurtenances, but to entitle him to a defense when sued in trespass for their removal, he should show his right. Evidently, there is nothing in the pleadings separating the house from the lands, but in reality a distinct setting up of a title to the house, and a right to enter upon another's real estate, and a question, to some extent, of a title to the land itself. Under a like law in New York, the court held that such cases are within the section. (8 Barb. 569; 6 Wend. 539.)

We affirm the judgment below.

STATE OF OREGON, RESPONDENT, v. WILLIAM ELLIS,
APPELLANT.*Appeal from Clatsop County.*

FROM the judgment and sentence passed upon appellant, in the court below, on a verdict of guilty of an attempt to commit rape, he appealed to this court, and the notice of appeal contains no specification or assignment of error. Appellant moves the court to dismiss the appeal for that reason.

Hill & Mulky, for appellant.

E. D. Shattuck, for respondent. •

WILSON, J. The requisitions of the Code in reference to appeals in criminal, materially differ from those in regard to

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civil causes. On the part of the state, the grounds for appeal are limited to two causes. Notices are to be served differently. No bond in appeal other than a bail bond is required. The effect of the appeal is changed in some respects. And the reasons for dismissal are limited, and nowhere does it require that the notice of appeal shall contain an assignment of errors. The Legislature evidently intended to provide all necessary regulations in appeals in criminal matters in the enactment of the Chapter XXIII of the Criminal Code; and when a party has complied with all necessary provisions found there, we think he has a right to be heard here. In order that certainty may be obtained in this class of cases, under the authority of the statutes, this court will order as a rule, that, after the appealed case is in this court, the appellant shall, if required by respondent, make and file here an assignment of the errors relied upon, within such time as the court may indicate. The motion is denied.

HENRY FAILING AND OTHERS, RESPONDENTS, v. A. M. OSBORNE, APPELLANT.

Appeal from Lane County.

CONDITIONAL AGREEMENT.—The parties having entered into an express agreement, to be liable in a certain contingency, no agreement to assume other similar liabilities can be implied. The specification of a particular contingency, excludes all ideas of liability upon a different contingency.

COVENANT OF WARRANTY.—The plaintiffs stipulated on the sale of land, to refund the purchase money, "if it should be adjudged that they had no legal right to sell, and if said defendant by reason thereof, be legally compelled to give up possession of said premises." *Held*, that the defendant borne had no greater right under this contract, than one who takes under a covenant of general warranty. That there must be an ouster; either actual or constructive, before a cause of action arises.

EQUITABLE RELIEF ON SALE OF LAND.—The cases in which courts of equity interfere to give relief, where the land exceeds or falls short of that which is specified in the deed or contract of sale, are those in which the sale of land has been made by the acre or foot, or where there has been fraud or wilful misrepresentation.

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THIS action was to recover \$1,000, upon a promissory note made by the defendant on the twenty-first of December, 1866, payable to the plaintiffs. The defendant answered that the plaintiffs, having judgment against one J. L. Brumley, had caused execution to issue and to be levied on a tract of land in Lane County, known as "Brumley's Ranch," which tract was offered for sale on the execution, on the fifth of December, 1866, and was by the sheriff struck off to one Woodward, who failed to complete the purchase; that the defendant, at the plaintiff's request, took the place of Woodward, and completed the purchase undertaken by Woodward, taking the land at \$4,000, paying \$2,000, and giving his two promissory notes of \$1,000 each, one note payable April 1, 1868, and the other April 1, 1869, that the plaintiffs knew that the title to a part of the land was not good, but represented to the defendant, that the title was good, and represents that the tract contained 1,200 acres, that through the plaintiff's representations the defendant was induced to take a title under said sheriff's sale, by an assignment from Woodward, of the sheriff's certificate of sale, under said judgment; that the tract contained only 1,040 acres, and that the title to a large part of that failed, to defendant's damage, in the sum of \$2,500. The defendant asks to have the same off-set against this note, and asks that the other note, due April 1, 1869, be delivered up to be cancelled. The replication denied the affirmative allegations in the answer.

The transcript contains the evidence taken on the trial of the cause. The evidence, which is somewhat voluminous, relates to several disputed questions of fact; some of which, under the view taken of the case by this court, are not material. Among other things, it was shown on the trial, that at the time of the execution of the two promissory notes, one of which is the basis of this action, and at the time of transferring to the defendant, the sheriff's certificate, originally intended for Woodward, the plaintiffs made a written promise or agreement to the defendant Osborne, which was

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subscribed by their attorney, and accepted and offered in evidence in this case by the defendant, in the words following, viz.: "In consideration of a sale of lands, say about 1,200 acres in Lane County, made December 5th, 1866, by virtue of sundry executions against J. L. Brumley, and the certificate of sale having been, this twenty-first December, 1866, assigned by Woodward, the purchaser, to A. M. Osborne, and inasmuch, as since said sheriff's sale, and before the assignment, a rumor has come into circulation, that the legality of said sheriff's sale may be contested, and the said Osborne having given his notes for \$4,000, purchase money. Now it is agreed by H. W. Corbett, Henry Failing, Smith & Davis, Canfield, Pierson & Co., S. A. Wood, and Jones, Tobin & Co., the creditors, at whose instance said executions were issued, in consideration of the foregoing, that if it shall be adjudged that said creditors had no legal right to sell said premises, and that, if said Osborne shall, by reason thereof, be legally compelled to give up possession of said premises, then said creditors shall refund the purchase money paid by him, with interest from the date of being so compelled.

"S. ELLSWORTH,

"Att'y for said creditors."

"Dated December 21, 1866.

The court below rendered a judgment for plaintiffs, and defendant appealed.

Williams & Willis, for appellant, claims that by said instrument, plaintiffs agreed that they had good right to sell said land to Osborne, and that he should hold and quietly enjoy the same. (Rawle on Covenants, 529, 30, 32, 33; 3 Cushing, 419; 18 Cal. 660, and very many other authorities cited.)

If the legal title to the land was not in Brumley, no execution obtained by any of his creditors, could be levied upon it. They could not claim lawfully what was never vested in him. (15 Mass. 215, note "a.")

Plaintiffs fraudulently procured defendant to accept that title by sheriff's sale, knowing that the title to the land was not good.

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Judge Shattuck and *S. Ellsworth*, for respondents, claims neither the plaintiffs or their attorney, made any misrepresentation as to title or quantity of land of their debtor, but if they had, no liability would attach to them. *Caveat emptor* applies with full and peculiar force to judicial sales. (Story on Sales, sec. 169; 5 John. Ch. 84; 23 Pick. 265; 3 N. Y. 79, etc.)

There was a special agreement in writing, which includes all the terms of the agreement between the parties.

Lands were sold in bulk; and vendor, even if owner, is not liable for deficiency in quantity. (3 Selden, 210; 26 Wend. 169; 6 Cow. 481, etc.; 8 Allen, 334 as to representations of price or value.)

UPTON, J. The defense relied upon in this case, is substantially, that the plaintiffs being interested in procuring a responsible bidder for the premises levied upon, falsely represented the title to be good, when they knew it to be bad as to part of the land, and that they represented the parcels constituting the tract, as containing 1,200 acres, when, in fact, they contained but 1,040 acres. The written agreement offered in evidence by the defendant, as made at the time of, and as part of the transaction, contains a recital that "a rumor has come into circulation, that the legality of said sheriff's sale may be contested." The defendant was put upon inquiry whether the sheriff had a "legal right to sell said premises." Under this state of facts, the parties entered into an express agreement that, upon certain contingencies, the plaintiffs would "refund the purchase money," then about to be paid by the defendant. If the property did not belong to Brumley, the creditors had no legal right to sell. A rumor had arisen, and come to the knowledge of the contracting parties, that that question might be contested, and they stipulated that "if it should be *adjudged* that said creditors had no legal right to sell, and if said Osborne, by reason thereof, be *legally compelled* to give up possession of said premises," they would refund, with interest. It seems to have been distinctly settled what risk each party would take

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The defendant Osborne, assumed the responsibility in case of a contest to defend until judgment should be had, and until he should be legally compelled to surrender possession. If he could defend successfully, he could claim nothing from the plaintiffs. If unsuccessful, he had recourse upon them for the purchase money and interest, but not for the costs of the action. The parties having entered into an express agreement to be liable to a certain extent, or upon a certain contingency, no other agreement in regard to the same matter, can be implied, and the particulars being expressed, excludes all ideas of liability upon the contract to a greater extent, or upon a different contingency. The recitals show that the risk of title was a subject under consideration, and it was settled by express agreement, what, and how much, liability each party undertook to assume. The liability assumed by the plaintiffs, was similar to that assumed by a grantor, who enters into a covenant of general warranty, in those states where the purchase money and interest is held to be the measure of damages. The legal effect given by construction, to the formal words of general warranty in those states, is precisely what the parties have expressed in words in this instrument. The evidence does not tend to show that the plaintiffs resorted to artifice or intentional deception, and it is shown that the plaintiffs had peculiar means of knowing the condition of the title, not equally open to the defendant. It cannot reasonably be contended, that, under the terms of this instrument, the defendant had any greater rights than those of a grantor under a deed of general warranty. He claims to recover \$2,500 damages, and to have the damages set off to that extent, against the promissory note. The time has not arrived, when he can claim damages on account of failure of title, because by the terms of the agreement, no such right accrues to him, until he is turned out of possession. There must be an ouster, either actual, by being put out, or constructive, by surrendering to the paramount title, before the purchase money can be claimed. (*Abbott v. Allen*, 2 John. Ch. 519.) The point in regard to the alleged

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mistake in the number of acres, is settled by authority too firmly, to be open to argument at the present day. It is not alleged that any deception was practiced in regard to the quantity, but simply that the tract was represented as 1,200 acres, when in fact, it contained but 1,040 acres, that is, the tract contained but thirteen fifteenths of what the parties supposed at the time of the contract. "The cases in which courts of equity interfere to give relief, when the land exceeds or falls short of that which is specified in the deed or contract of sale, are those in which the sale of the land has been made by the acre or foot, or where there has been fraud or wilful misrepresentation, on the part of the party against whom relief is sought, to induce the other party to believe the quantity of land conveyed, was different from what it really was." (*Morris Canal Co. v. Emmett*, 9 Paige, 168.) In this case, several different donation claims make up the one tract sold, and there is nothing in the allegations or proof, to show that any of these were sold by the acre.

Judgment should be affirmed.

JAMES H. FISKE AND CLEMENTIA V. FISKE, PLAINTIFFS
AND RESPONDENTS, v. JAMES KELLOGG AND W. J. BRADBURY,
DEFENDANTS AND APPELLANTS.

Appeal from Clackamas County.

PROBATE SALE.—INFANT HEIR A NECESSARY PARTY.—*Held*, That a sale of a decedent's real estate to pay debts by virtue of an order of the probate court, under the statute (1855), is void as to an *infant heir* not made a party to the proceeding, and for whom no guardian was appointed. Such proceedings are hostile to the *heirs*, who are *necessary parties*, and the probate court must have jurisdiction of the *persons* (as well as the subject matter) in the manner provided for in the statute, or the sale will be void.

Wm. Strong and David Logan, for appellants.

Mitchell & Dolph and S. Ellsworth, for the respondents.

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PRIM, J. This was an action to recover certain real estate, situate in Clackamas County, belonging to the estate of Lot Whitcomb, deceased. The respondents are husband and wife, and Clementia V. Fiske, the daughter, heir and devisee of the said Whitcomb.

The executors of the will of the deceased sold the land in controversy under an order of sale made by the probate court of Clackamas County, and appropriated the proceeds thereof in payment of the debts of the decedent.

At the time this order of sale was made, Clementia Fiske was a minor, had no guardian, and was not made a party to the proceeding. Appellants were in possession of the property and claim title under the sale made in pursuance of this order.

The principal question arising in this case is, as to the validity of the order of the court authorizing the sale of the land. It is claimed by respondents, that this order was void as to them, for the reason that Clementia V. Fiske, whose interest they represent, had no notice and was not made a party to the proceeding.

Appellants insist, that this being a proceeding in the probate court to convert realty into personalty, for the payment of the debts of the decedent, is not a suit, or in the nature of a suit, but a mere *proceeding in rem*, in which the executor is the sole *representative* of the estate, and therefore the *heirs* are *persons interested* in the estate, are not adversary parties to the proceeding. They insist that this position is sustained by several cases cited from other states, and one case at least, decided by the supreme court of the United States. This case relied on is the case of *Grignon's Lessee, v. Astor*, reported in 2 Howard, p. 319. That case arose under a statute in Michigan, and by looking into it, it will be seen that its provisions differ very materially from those contained in our statute of 1855, under which the proceeding now under consideration was had. The first section of the Michigan statute provided, "That upon representation of the insufficiency of the goods of an intestate to pay his

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debts, the same being made to appear to the court, the said court was authorized to empower and license the administrator to make sale of all or part of the real estate of the intestate; and the administrator, by virtue of such license, should by deed convey the same title as the deceased in his lifetime could have conveyed." The court held, that the language used in this section of the act vested in the court jurisdiction to *make the order of sale, upon facts stated in the petition* being made to appear. It further held, that the mode of proof and giving notice prescribed by a subsequent section pertained to the exercise of jurisdiction after it was acquired, and was directory merely.

We will now refer to a few sections of our statute of 1855, page 360:

Section 9. "If it shall appear, by such petition, that there is not sufficient personal estate in the hands of the executor or administrator * * * to pay the debts outstanding against the deceased, * * * and that it is necessary to sell the whole or some portion of the real estate, for the payment of such debts, the probate judge shall therefore make an order directing *all persons interested* to appear before him at a certain place and time therein specified, to show cause why such an order should not be made."

It will be noticed by the provisions of this section when a petition is filed by the executor or administrator containing the facts necessary to give the court jurisdiction of the subject matter, the probate judge is required to make an order, directing all the parties interested to appear and show cause why an order to sell the real property should not be made; while the Michigan statute provides that when such a petition is filed, and the facts therein made to appear to the court, the court is authorized to empower and license the executor or administrator to sell so much of the land as may be necessary.

Section 10. "A copy of such order to show cause, shall be personally served on all persons interested in the estate," * * * or shall be published at least four successive weeks, etc. This notice can be dispensed with by all per-

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sons interested in the estate signifying in writing their assent to the sale.

Section 12. "If any of the devisees or heirs of the deceased are minors, and have a general guardian in the country, the copy of the order shall be served on the guardian; if they have no guardian, the court shall, *before proceeding to act* upon the petition, appoint some disinterested person their guardian for the sole purpose of appearing for them, and taking care of their interest in the proceedings."

Section 13. "The executor or administrator may be examined under oath, and witnesses may be examined, by either party; and process to compel their attendance, etc., may be issued as in other causes."

Section 16. "If the probate judge shall be satisfied after a full hearing upon the petition, and on examination of the proofs and allegations of the parties interested that a sale * * * of the real estate is necessary for the payment of debts, etc., * * * he shall make an order of sale authorizing the executor or administrator to sell, etc."

We apprehend these references to the provisions of our statute are sufficient to show that there is an obvious distinction between our statute and the one referred to in the case of *Grignon's Lessee*. Our statute plainly recognizes an interest in the infant heir or devisee in the land sought to be sold to pay debts; and plainly provides that they shall not be deprived of it without appearing or an opportunity of appearing and being heard by their guardian.

The statute of New York, passed in 1813, contained provisions substantially the same as ours. The case of *Schneider v. McFarland*, 2 Cowen, 462, arose under that statute, and was a case precisely like the one under consideration. The case of *Grignon's Lessee*, and nearly all the cases cited in this case by appellants, were thoroughly reviewed by the court in deciding that case. The learned judge, in delivering the opinion of the court, says: "No amount of proof would justify an order of sale until the necessary measures provided by law were adopted to secure the appearance of the infant heirs or devisees, and to bring in the other parties in

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interest." * * * He further says: "The administrator is not therefore the *sole* representative of the real estate of the deceased in these proceedings. He is the moving party in behalf of the creditors. His object is by a special proceeding before a court of limited jurisdiction to turn the real estate into personalty with a view to the payment of debts. The heir has a right to contest his allegations, and show that no such necessity exists. The right is a most important one, and one which the statute effectually secures to him." Again he very properly says: "It is a proceeding by which the infant heir may be deprived of his inheritance, and to which he is an adversary and necessary party, with a right by his guardian to represent and defend his own interest. It is therefore as essential that the surrogate (here probate court) should acquire jurisdiction of the person of the heir, to conclude his right by an order of sale as it is of the property which is the subject of it. The case of *Bloom v. Burdick*, 1 Hill, 139, is to the same effect, and is referred to and approved by the court in the case cited above. (See also *Biglow v. Suarna*, 19 Johnson, 38; 33 Cal. 50.) In this case we hold that the sale of the real estate of Lot Whitcomb made by his executors under the order of the probate court was void as to respondents, for the reason that one of them, Clementia V. Fiske, was a minor, without any guardian at the time, and was not made a party to the proceeding. It is further insisted by appellants, that as said Clementia Fiske claimed title as devisee, she can only take under the terms and restrictions of the will. The language used in the will is: "After all my lawful debts are paid and discharged the residue of my estate, real and personal, I give and bequeath," etc. They insist this language implies a devise to the executors of the land in trust for the payment of debts, and also implies authority to them to sell the real estate for that purpose, without applying to the probate court for an order of sale. We think the language used in the will, will not bear any such construction. Section 29 of the act of 1855, p. 363, provides that: "If the testator shall make provision by his will, or designate the

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estate to be appropriated for the payment of his debts, * * * they shall be paid according to the provisions of the will, and out of the estate thus appropriated." And by section 30: "When such provisions has been made, or any property directed by the will to be sold, the executor or administrator with the will annexed may proceed to sell without an order of the probate court." In this case, the will does not provide or designate what estate shall be appropriated for the payment of debts, nor does it direct any property to be sold, but merely provides generally, that "after all of his lawful debts are paid and discharged," what shall be done with the residue of his estate, both real and personal. We are unable to see how this provision of the will could make any difference, as the statute then in force required all the debts of the decedent to be paid before any devisee or heir could take the real estate. We hold the executors had no authority under the provisions of the will to sell the real estate of the decedent for the payment of his debts without first duly obtaining an order of the probate court for that purpose, and any sale made by them without such an order was void as to respondents. The decree of the circuit court is affirmed.

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ALEXANDER STEWART, RESPONDENT, v. RUFUS PERKINS,
APPELLANT.

Appeal from Baker County.

AGENT.—P. being sued for the rent of an undivided interest in a water ditch, answered that he was in possession only as the agent of M. The jury found a general verdict for the plaintiff but also found a special verdict that P. was in possession as agent of M. It was error to hold P. personally liable to the plaintiff for rents due on the ditch.

The facts are stated in the opinion.

Kelly & Reed, for the appellant.

I. D. Haines and S. Ellsworth, for the respondent.

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In 1865, W. H. Packwood, by a written lease, demised the fourteen twenty-fourths of the Clark Creek mining ditches to S. B. Morse for the term of three years, and afterwards sold his interest in the ditches to Alexander Stewart, the plaintiff. In December 1867 Morse employed Rufus Perkins the defendant to manage and attend to the ditches during his absence; he also instructed him how to dispose of the proceeds of the sales of water. Stewart, claiming that the proceeds of the ditches had not been paid to him in accordance with the terms of the lease, commenced this action against Perkins, as the person in possession of the demised premises, for the amount alleged to be due him. The defendant denied being in possession of the ditches except simply as the agent of Morse to whom he claims he is accountable for all moneys received.

The issues of fact were submitted to a jury who returned a general verdict in favor of plaintiff and assessed his damages at \$565 $\frac{4}{10}$, and under the direction of the court returned certain special findings of fact; and among the others appears the following:

"We find that defendant held possession of said ditches as the agent of S. B. Morse."

From these findings of fact the court found as a matter of law that the defendant was liable personally to the plaintiff for the rent of the ditches. The court also found that the general verdict for the plaintiff was inconsistent with the special verdict and should be modified to \$90 $\frac{4}{10}$ and rendered judgment for the plaintiff for that amount and costs. To all of which rulings of the court the defendant then and there excepted.

PRIM, J. The jury in this case to whom was submitted the issues of fact, returned a general verdict in favor of the plaintiff and returned specially at the same time that "the defendant held possession of said ditches as the agent of S. B. Morse." This special finding is inconsistent with the general verdict and should control it. The code provides that "when a special finding of facts shall be inconsistent

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with the general verdict, the former shall control the latter and the court shall give judgment accordingly." (Code 192, sec. 213.) The court found as a conclusion of law that the defendants possession of said ditches as the agent of Morse was sufficient under the statute to render him accountable and liable to the plaintiff the assignee of Packwood, for the rent of the ditches.

Sections 31 and 32, page 718, of the general laws of Oregon, are relied upon to sustain this view of the case. Section 31 provides that "every person in possession of land, out of which any rent is due, whether it was originally demised in fee, or for any other estate or freehold, or for any term of years, shall be liable for the amount or proportion of rent due from the land in his possession." Section 32 provides that "such rent may be recovered in an action at law, and the deed of demise, or other instrument in writing, if there shall be any, showing the provisions of the lease may be used in evidence by either party, to prove the amount due from the defendant."

The old common law doctrine was that a rent charge could not be apportioned by the act of the landlord, on the principle that the contract was an entirety, and could not be apportioned. The objection was "that it exposed the tenant to several processes of distress for a thing which was originally entire, and he ought not to be obliged to pay his rent in different parcels, and to several landlords, when he contracted to pay one entire sum to one person."

Sections 31 and 32 of the statute heretofore referred to, were copied from sections 22 and 23 of chapter 60, of the Revised Statutes of Massachusetts. They were adopted there, to remedy a supposed defect in the old law, and to authorize an apportionment of rent in certain cases where a reversioner wishes to sell his estate in different parts, to different persons, or to make provision for his children. The Supreme Court, the highest judicial tribunal of that state, has given a judicial construction to the two sections contained in their statute. In *Campbell v. Stetson*, reported in 2 Metcalf, 504, SHAW, C. J., in delivering the opinion of

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the court, says: "These are part of a series of provisions respecting long terms, where a rent is reserved, and where the lands out of which such rents are to issue, are to be treated as real estate, and as such may be divided and subdivided by descent, partition, levy of execution and otherwise, with various detailed provisions in regard to terms, and the apportionment and recovery of rents. But these statutes do not declare when, and by what acts, a right to rent shall be created, vested, and transferred, but only declare how it may be recovered when it is due; that is, apportioned and recovered in an action of debt. They are intended to prescribe remedies—not to establish rights." We think it is very clear that sections 31 and 32 had no applicability whatever, to such possession of real estate as Perkins had in this case. He was not in the possession of the ditches in his own right, as the sub-lessee or assignee of Morse, the original lessee of Packwood, but was simply there as Morse's agent, employed by him to manage and control them during his absence. The possession of Perkins was the possession of Morse, his principal, and under the plain rules of law, applicable to the relation of principal and agent, he was bound to account to him for the proceeds of the sales of water. To hold him personally liable for the rent due on the ditches to the lessor of his principal, would be contrary to every rule of common sense, as well as justice.

Therefore, we think the circuit court erred in holding that defendant was personally liable to plaintiff for the rents due him on the ditches.

Judgment reversed.

 Besser v. Hawthorn.

L. BESSER, RESPONDENT, v. J. C. HAWTHORN, CINCINNATUS SHULTZ AND MARY SHULTZ, APPELLANTS.*

Appeal from Multnomah County.

PARTIES—SUBSEQUENT INCUMBRANCES.—The statutes of this state were silent until 1862 as to whether subsequent incumbrancers were necessary parties to suits of foreclosure. In the absence of any statutory provisions on the subject, the general equity rule laid down in equity pleadings is applicable, which is, that all incumbrancers, whether prior or subsequent, are proper parties, and if omitted, the decrees will not bind their rights.

ON the twentieth of June, 1859, one of the defendants, Cincinnatus Shultz, for a valuable consideration, executed to the plaintiff his note for \$500, payable in two years, with interest at three per cent. per month. To secure the payment of the note, Shultz and Mary his wife executed a mortgage upon the property described in the complaint, of which Shultz was then the owner in fee, which mortgage was duly recorded on the twenty-second day June, 1859. Shultz had purchased this property of James B. Stephens, on the seventh day of June, 1859, for \$400, for which he had given his note, and to secure which, he had executed a mortgage upon the same property, which was also duly recorded on the twentieth of June, 1859. The wife of Shultz did not join in the mortgage.

In October, 1859, Stephens commenced a suit to foreclose his mortgage, making Shultz a defendant, but he did not make the said Mary or this plaintiff parties. On the twenty-third of November, 1859, he obtained a decree of foreclosure and sale, and judgment for the amount of his note and interest. And on the thirty-first of December, 1859, he purchased the block at sheriff's sale under said decree, for \$620, and received a sheriff's deed on the twenty-second of June, 1860. Stephens and wife conveyed the property to Mary White on the twentieth of December, 1860, and Mary

* The opinion in this case has been filed since the insertion of the note on the page *Ante*.

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White and her husband conveyed it on the thirtieth of October, 1866, to the defendant, J. C. Hawthorn.

The plaintiff filed his bill in this suit on the thirtieth of January, 1867, against Shultz and wife and J. C. Hawthorn, to foreclose his mortgage. Shultz and wife made default, but Hawthorn filed his answer, setting up substantially, that the plaintiff being a second mortgagee, was barred by the foreclosure of the first mortgage, he having failed to redeem within the time limited by statute. At the hearing, the court below decreed a sale of the premises, and that the proceeds be applied, first, to the payment of the principal and interest of the defendant Hawthorn, the note given to Stephens for \$400; second, to the payment of principal and interest of the note held by plaintiff; third, the residue to the defendant Hawthorn.

J. H. Reed, for the appellant.

Mitchell, Dolph & Smith, for the respondent.

PRIM, J. The principal question arising in this case results from the omission of the second mortgagee as a defendant in the foreclosure of the first mortgage. The statute in force in this state prior to 1862 was silent upon the necessity of making subsequent incumbrancers parties to suits of foreclosure. The general rule, as stated in Story on Equity Pleadings, sec. 193, was, "that all incumbrancers, as well as the mortgagor, should be made parties, if not as indispensable, at least proper parties to such a bill, whether they are prior or subsequent incumbrancers." This rule, we think, was undoubtedly applicable in the absence of any statutory provision on the subject. In the argument of the case, counsel seem to differ very radically as to the effect of a subsequent incumbrancer not being made a party in the foreclosure of a first mortgage. It is claimed by respondent, that if he should be omitted, he would in no way be bound by the decree; while it is insisted by appellant that he would be bound by it, and could only attack the pro-

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ceedings on the ground of fraud or collusion. The rule seems to be well settled and uniformly supported, that subsequent incumbrancers must be made parties, and if omitted, the decree will not bind their rights.

In the case of *Hains et al. v. Beach et al.*, in 3 Johnson's Ch. 461, the same question raised in this case was before the court for decision, and the chancellor, in delivering his opinion, said: "It was the duty of Gardner [the first mortgagee] to have made the younger mortgagee a party to his bill; and all incumbrancers existing at the commencement of the suit are entitled to be parties, for they have an interest to be affected, and ought to have an opportunity of paying off the prior incumbrances. The rule, therefore, has been well settled and uniformly supported, that the subsequent incumbrancers must be parties, and if omitted, the decree will not bind their rights." The chancellor then proceeded to cite a large number of English cases sustaining this rule.

Section 64 of the act of 1854, page 204, in providing what shall be the force and effect of deed obtained under decrees of foreclosure, provides that "such deeds shall be as valid as if executed by the mortgagor and mortgagee, and shall be an entire bar against either of them, and against all parties to the suit in which the decree for such sale was made, and against their heirs respectively, or all persons claiming *under such heirs.*"

By this section of the statute, the deed is binding *only upon parties to the suit and their heirs.* Then we think it may be legitimately inferred from this provision, that it is not binding on persons having specific liens against the property at the time of the commencement of suit, and not made parties. It will be further observed that this section provides that such deeds shall vest in the purchaser the same estate and no other or greater than would have vested in the mortgagee, if the equity of redemption had been foreclosed; and it "shall be as valid as if executed by the mortgagor and mortgagee." Then in this case, if Shultz and Stephens had conveyed all their rights without foreclosure to Haw-

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thorn, who now claims under the foreclosure sale, he would in that event become the owner of the prior mortgage, and of the equitable right of redemption, subject to the payment of the amount due on the second mortgage owned by Besser, the plaintiff in this suit. Then the sale under the decree in the foreclosure suit, brought by Stephens upon the first mortgage was wholly inoperative as to the rights of Besser, the second mortgagee, for the reason that he was not a party to that suit. The only right therefore, which Hawthorn acquired under that sale, as against Besser, was the right to the prior lien upon the premises, to the extent of the amount of money due on the Stephens note and mortgage, at the time of sale, in the same manner as if Stephens had assigned that mortgage to him without foreclosure. But as against Shultz, the mortgagor, he acquired the right of redemption, subject to the payment of the amount due on Besser's mortgage, which was a specific lien on the property. Therefore, we hold that Besser's right to foreclose his mortgage, was not impaired, and that his mortgage remains a valid and subsisting lien on the premises, it being of record. (*Vanderkemp et al. v. Shelton*, 11 Paige, 28.)

The decree of the circuit court was correct, and therefore is affirmed.

DAVID B. SIMPSON, JESSE DAVIS, W. C. MOONEY AND
LUCIEN EVERTS, PLAINTIFFS AND APPELLANTS, v. G. W.
BAILEY, O. F. CLARK, H. K. SCHOOLING AND O. F.
THOMPSON, DEFENDANTS AND RESPONDENTS.

Appeal from Umatilla County.

COUNTY SEAT, LOCATION OF.—CONSTITUTION.—*Held*, that the act of the legislature changing the location of the county seat of Umatilla county, is constitutional; and that the proceedings of the county officers in pursuance of said act valid. The subject of art. 4, sec. 20, of the constitution is to prevent matters wholly foreign, and disconnected from the subject expressed in the title of the act from being inserted in the body of the act.

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THIS is a suit in equity to restrain the defendants, who are the county officers of Umatilla county, from tearing down the old county building at Umatilla landing; and from incurring additional debts and liabilities in behalf of Umatilla county; because the indebtedness of said county, already exceeds the constitutional limit. Plaintiffs also seek in this suit to test the validity of the act of the legislative assembly, approved October 13, 1868, authorizing the removal of the county seat of Umatilla county; and to compel the county officers of said county to remove their offices back to Umatilla city.

Section 1, of the act in question provides for an election to locate the county seat and among other things that "the present location, Umatilla landing, shall be one candidate and Upper Umatilla some where between the mouths of Wild Horse and Birch creeks, the other candidate to be voted upon at said election."

Sec. 2 provides that "the county clerk shall plainly write the above named candidates upon the poll books of said county, as in other cases of like practice," and the candidate receiving the majority of all the votes cast shall be the county seat.

Sec. 3 provides that the county court shall convene within one month after the election, and appoint "three competent persons to locate the site for the erection of new county buildings, and shall immediately select some point between the said mouths of Wild Horse and Birch creeks on the Upper Umatilla as in their judgment shall best subserve the interest of the whole county, and shall give an appropriate name to said new county seat."

Sec. 4, provides for removal within a year; sec. 5, for expenses; sec. 6, repeals inconsistent acts; and sec. 7, that the act shall take effect immediately.

This bill came on for hearing before the circuit court and was dismissed, and the plaintiffs appealed.

Mitchell, Dolph & Smith, for the appellants.

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Kelly & Ellsworth, for the respondents.

PRIM, J. It is contended that the act of the legislature authorizing the removal of the county seat of Umatilla county is unconstitutional, and that all the proceedings under it are void, for the reason, it is claimed, that several distinct subjects of legislation are embraced in the act, and whereas only one subject is expressed in the title.

Art. 4, sec. 20, of the constitution, provides that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The title of this act is, "an act to change the location of the county seat of Umatilla county." It is true that this act provides for the submission of the question of the change of location to the voters, the selection of the new site and the removal of the county buildings; but we apprehend that those are all matters properly connected with the "change of the location," which is the subject expressed in the title of the act. If the construction contended for by appellants should prevail, the title of a bill would necessarily be nearly as long as the act itself. Such a construction we apprehend was never contemplated by the convention in adopting this provision of the constitution. The object of the provision evidently was to prevent matters wholly foreign and disconnected from the subject expressed in the title from being inserted in the body of the act. This restriction is a very important one, and well calculated to prevent imposition being practiced upon unsuspecting members, by procuring their votes for bills with fair titles, which contain objectional matters unconnected with the subject expressed in the title. By this act, the change of location of the county seat was made to depend upon the vote of the electors of the county. This act was authorized by art. 1, sec. 21, which provides that "laws locating county may take effect or not upon a vote of the electors interested."

Simpson v. Bailey.

A further objection is made to this act of the legislature, because it authorizes the appointment of three commissioners by the county court, to select the particular site upon which to erect the county buildings. This, it is claimed, was delegating legislative authority, but we think this point is not well taken; for it had already been decided by the electors of the county, that the county seat should be located at a point on the upper Umatilla, somewhere between Wild Horse and Birch Creeks, which were only a few miles apart. The land between these two points was owned by different individuals, and the business of the commissioners was to select the particular site or piece of land somewhere between these points, upon which to erect the county buildings, and make an arrangement with the owner thereof, to obtain the title. Suppose the legislature should pass an act, locating the county seat of Marion County, at the city of Salem. Salem is quite a large place, and its corporate limits are quite extensive; the city is laid off into blocks and lots, and these are owned by different persons. Would it be necessary, in order to make the act valid, for the legislature, after locating the county seat at Salem, to go on in detail, and provide that the county buildings should be erected upon a certain block, in a certain part of the city. We think not. In such case, the county commissioners would be authorized to select the best site they could, anywhere within the city limits. For these reasons, we hold that the act of the legislature, locating the county seat of Umatilla, and the proceedings of the defendants under the same, were valid. The decree of the circuit court dismissing the bill, is affirmed.

Canyon Road Company v. Lawrence.

CANYON ROAD CO., RESPONDENT, v. B. F. LAWRENCE,
APPELLANT.

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Appeal from Douglas County.

APPEAL.—An undertaking must be filed within the time prescribed, to wit, within ten days after the service of the notice of appeal is given, or the appeal is not perfected, and will be dismissed on motion.

A MOTION was made in this case to dismiss the appeal, for the reason that the said appeal has not been perfected, since there was no undertaking filed, as was required by law; and a cross application to file an undertaking, supported by affidavit, is also made. The record discloses these facts: the notice of appeal and the accompanying certificate of errors was filed August 17, 1870, and service acknowledged on the same day, and the undertaking was filed Sept. 3, 1870, that is, a greater period of time than ten days elapsed between the service of the notice of appeal and the filing of the bond.

Watson & Willis, for respondent.

L. F. Mosher, for appellant.

MCARTHUR, J. It is unnecessary to refer directly to the facts in the affidavit. Sec. 527 of the code of civil procedure, prescribes the manner in which appeals shall be taken and perfected. Subdivision two of that section provides, that within ten days from the service of the notice of appeal, the appellant shall file with the clerk the required statutory undertaking. We are of opinion that the provisions of the statute in regard to the time within which the undertaking on appeal is required to be filed, should in all cases be strictly complied with. The true construction of subdivision 2 of section 527 of the code of civil procedure, is that the appeal shall not be considered as perfected or effectual for any purpose, unless an undertaking be filed within ten days after the service of the notice of appeal.

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If this be the construction, it is clear that the failure to file the undertaking is fatal to the appeal. The consequence attached to the failure is, that the appeal shall not be effectual, and this consequence can only be enforced by giving full effect to the provision as to time. This rule is laid down in *Elliot v. Chapman et al.*, 15 Cal. 383.

Appellant's counsel in the argument of this motion urged that, by virtue of subdivision 4 of sec. 527 of the code, this court could permit the undertaking filed to stand, upon imposing terms, and thereby remove the effect of the statutory provision, limiting the time within which an undertaking on appeal should be filed, and in support of this position, referred to a decision of this court, which, by virtue of subdivision 4 of sec. 527, permitted a party to make a deposit in lieu of a defective undertaking, filed within the time limited by the code. We are of opinion that the case referred to, is not parallel with the case now under consideration. In the case at bar there is no question as to the power of the court to allow an amendment. No undertaking was filed within the time limited by the statute, and the consequence is that there is nothing to amend. It is not the case of a defective undertaking, but of no undertaking at all. In construing the statute, we must look to the language used, and endeavor to ascertain the intention of the legislature. It is an established principle that provisions as to time are to be construed as directory, but such a construction is improper where a consequence is attached to a failure to comply. In such a case, the consequence can be avoided only by strict compliance with the statute. In considering the application and affidavit, the court finds, that while the attorney observed all the diligence which the law requires in this matter, and perhaps more, yet the facts set forth in that affidavit conclusively show negligence and laches on the part of the defendant in the court below, who, it is presumed knew the law, and rested under sufficient knowledge of the requirements of the statute. Every presumption of negligence, laches, or mistake, is raised against the actor

Stimson v. Estes.

or moving party in any proceeding whatsoever, and when such party has been guilty of either, he is seldom, if ever, viewed with favor by the law or the courts. Besides this, there are many cogent reasons why the court should adopt plain, positive, and pointed rules in relation to this matter of undertakings, in order to close the door against fraud. If so, after a judgment is obtained, an appeal is desired for any cause, the appellant need only serve his notice of appeal in order to effect the purposes which the statute declares shall only be effected by filing the undertaking. If this court adheres to loose dicta in this matter, a defendant can, after his notice of appeal is served, rest perfectly secure in the assurance that, upon what he may urge as a mistake this court will exercise its discretionary powers, and permit an original undertaking to be filed during the term, and the party, plaintiff in the court below, who has taken the pains and gone to the expense of securing a judgment, is not only subjected to unwarrantable delay, but, in many cases, may be compelled to sit quietly by and behold the property, out of which his judgment could be made, rendered valueless through natural causes, or placed beyond the reach of process through fraudulent design. Leave to file the undertaking cannot be granted, and the appeal must be dismissed.

DANIEL S. STIMSON, RESPONDENT, v. ESTES AND STIMSON,
APPELLANTS.

Appeal from Multnomah County.

REFEREE, POWER OF.—It is the intention of the statute that trials before a referee proceed in the same manner as trials before a court, and that referees are clothed with the same authority in directing the manner of a trial, and in deciding motions which may arise during its progress.

THE facts are stated in the opinion.

Stimson v. Estes.

Mitchell & Dolph, for the appellants.

C. A. Dolph and W. Lair Hill, for the respondents.

BOISE, J. This is an action to recover on an account for labor performed for the defendants of the reasonable value as alleged of one hundred and eighty-nine and $\frac{3}{10}$ dollars, and for superintending the performance of certain street contracts in the city of Portland, under an agreement with the defendants, by the terms of which plaintiff was to receive for such service in superintending said street contracts, one-third of the profits accruing from street contracts, which profits plaintiff alleges in his complaint to have been two thousand eight hundred and one and $\frac{1}{10}$ dollars.

In their answer the defendants deny plaintiff's claim for service, but admit that the plaintiff superintended the street contracts as alleged, and that he was to have one-third of the profits thereof as alleged, but defendant says that the profits of such contracts were only six hundred and eighty dollars; and defendants further allege that they bought lot one in block seven with a part of the proceeds of said contracts for the joint benefit of plaintiff and defendants, and ask to have the purchase price thereof allowed in settlement.

Plaintiff in his replication denies the purchase of the lot with his knowledge or consent.

The case being at issue was referred to Geo. H. Durham, Esq., and he directed to hear the same and report the evidence and his findings of the facts and conclusions of law.

On the trial before the referee the plaintiff introduced his evidence and rested. Defendants then introduced their evidence in reply to plaintiff's evidence, and also evidence to support their answer and rested.

Plaintiff was then recalled and examined to rebut some new matter contained in the testimony of the defence, after defendants had cross-examined this witness the plaintiff rested his case.

Defendants' counsel then stated as follows (from the report): "We now offer Mr. Pennoyer as a witness."

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Plaintiff's counsel objected on the ground, that both defendants and plaintiff had rested their cases. (Referee goes on to say); "In ruling on the objection, I stated that if defendants wished to introduce testimony to impeach the rebutting witness of plaintiff, they had a right to do so, and the evidence would be admitted; or if they would show that by any accident or mistake, they had omitted anything necessary to their defense it would be admitted on such showing, otherwise it would not. They refused to state what they expected or wished to show, merely stating that they wished to ask what they had a legal right to." The referee then refused to open the case on this statement.

The question now presented to this court is, ought the court below to have set aside the report of the referee because he refused to receive and reduce to writing the testimony so offered by the defendant's counsel.

The counsel for the defendants rely on the statute, page 194, sec. 274, which provides (on trial before referee): "If evidence offered by either party, shall not be admitted on the trial, and the party offering the same, except to the decision rejecting such evidence at the time, the exception shall be noted by the referees, and they shall take and receive such testimony and file it with the report."

This matter involves the consideration of the manner of conducting a trial before a referee, as to his discretion in controlling the order of the trial. In a trial before a court, the rule is that plaintiff shall first introduce his proof, and when he has rested, the defendant shall introduce his proof, and when he has rested, the plaintiff may introduce testimony to rebut any new matter shown by the defendant—and when plaintiff has closed his rebutting testimony, the defendant cannot open his case again, except by leave of the court, and if the court allow it, it is a matter of discretion, and the order refusing the motion to reopen, is not subject to exception.

If during a trial, while a party is producing his testimony, and before he closes his case offers testimony which is refused by the court, such party may except to such refusal,

Stimson v. Estes.

and his exception must be allowed, and the testimony offered should be embodied in a bill of exception, so that the superior court can judge of its competency, on an appeal. And I think it was only the intention of the statute to extend this practice to trials before referees, so that their errors might be brought before the court in the same manner as the errors of an inferior court are brought before the appellate court; and that it is the intention of the statute that trials before referees shall proceed in the same manner as trials before a court, and that they are clothed with the same authority in directing the manner of the trial, and deciding matters which may arise during its progress; and that in such trials the order of producing proof is the same as in trials before a court. In fact, that the referee sits as the court in all respects. I think this is clearly indicated by section 223, of the code, where it is provided that "The trials by referees shall be conducted in the same manner as a trial by the court."

The construction contended for by the counsel for the appellants would take from the referee all control of the trial in respect to the order of the proofs and would be at variance with general practice. I think the words of the two hundred and twenty-fourth section of the statute, "If evidence offered by either party shall not be admitted," only refers to evidence offered in the course of a trial conducted as a court in the usual and established mode—and not to evidence offered out of order, and which it is in the *discretion* of the court to *refuse*.

The judgment will be affirmed.

O'Harra v. The City of Portland.

The trial resulted in a verdict for respondents in the sum of \$2,000, on which judgment was entered.

A number of questions were raised and discussed in the argument of this case, but the only one which we deem necessary to be decided by this court at present is, whether the city of Portland is liable, under the provisions of its charter, to any one for injuries to the person growing out of the defective condition of its streets.

Section 347 of the code provides, that "an action may be maintained against a municipal corporation * * * for an injury to the rights of the plaintiff, arising from some act or omission of such corporation." This section of the code was adopted in 1862, and the legislature, in adopting it, evidently intended to authorize the maintenance of such actions as this against municipal corporations. But in 1864, two years afterwards, and prior to the happening of the injury complained of in this action, the legislature amended the charter of the city of Portland, by the adoption of section 127, which provides, that "the city of Portland is not liable to any one for any injury to the person * * * growing out of the condition of any streets." (Special laws of 1864, p. 26.)

This provision of the charter, it will be seen, expressly exempts the city from any liability to persons for injuries received on account of streets being defective or out of repairs.

But it is urged, that this provision of the charter is unconstitutional, and therefore void. To sustain this proposition, section 21 of article 1 of the constitution of the state is cited, which provides, among other things, that "no law impairing the obligation of contracts shall ever be passed." How this amendment of the charter violates this provision of the constitution, we are unable to see; for it is not contended that there is any express contract on the part of the city to be responsible for the defective condition of its streets and sidewalks; and it certainly cannot be claimed that there is an implied contract to that effect, when in the very act of the legislature under which the city is incor-

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porated it is expressly provided, that it shall not be liable for injuries to the person growing out of the defective condition of its streets and sidewalks.

The court being of the opinion that the city is not liable under this provision of its charter for such injuries as are set out in the complaint, it is ordered that the judgment of the circuit court be reversed.

DALLES LUMBER AND MANUFACTURING COMPANY
v. THE WASCO WOOLEN MANUFACTURING COM-
PANY et al.

A CORPORATION CONFINED TO SPECIFIED BUSINESS.—A corporation organized for the purpose of "manufacturing and selling lumber," can not hold a lien for labor performed in the construction of a building. Where such a corporation sued to enforce a lien for both lumber furnished and labor performed in the construction of a building, and the complaint failed to show how much of the gross amount was for lumber furnished, the judgment was reversed.

MECHANICS' LIEN.—BUILDING.—The defendants occupied several buildings as a woolen factory, on some of which the material was furnished and the labor performed; the mechanic's lien does not extend to all the buildings, but is confined to the building for which the material was furnished or on which the work was done.

IDEM.—PLEADING.—It should appear by the complaint that notice of the lien was filed in pursuance of the statute.

Appeal from Wasco County.

THE case is stated in the opinion of the court.

Humason and Williams & Willis, for the appellant. It is not alleged that the lumber was used in any particular building. (25 Ill. 349; Code p. 763, sec. 1.)

The complaint should specifically set forth the amount furnished for the particular buildings. (Houck on Liens, pp. 162, 164 and 139.)

The proceeding is *in rem*. (4 Abbot, 205; 2 E. D. Smith, 662; 4 *Id.* 721.)

8	527
4	226
15	538
16*	412
3	527
24	46
32*	761
3	527
25	439
36*	161
29	164
29	445

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The plaintiff's articles of incorporation do not authorize the plaintiff to engage in building. (2 Roberts, 278; 3 Comst. 431; 2 Kent 298.)

Kelly & Reed, for the respondents. It appears that the buildings were all connected with the woolen factory to be used for a common object. (8 Barr, 437; 4 E. D. Smith, 734; 1 Ogn. 170.)

If there is error in entering the decree the error can be corrected in this court.

THAYER, J. This is a suit in equity, brought to foreclose a mechanic's lien, in the circuit court for Wasco County.

The complaint alleges that plaintiff is a corporation duly incorporated under the laws of Oregon, for the object and purpose of *manufacturing* and *selling* lumber. And that defendant is likewise a corporation, that between the sixteenth of September and the thirteenth of October, 1868, plaintiff sold and delivered lumber to, and performed labor for, defendant, in constructing its dry house, dye house, and bleach house, amounting to the sum of \$1,368.05. That between the twenty-sixth day of June, and the thirtieth day of October, 1868, plaintiff sold and delivered lumber and other material to, and performed labor for, defendant, in the construction of its woolen factory, dry house, dye house, and bleach house, amounting to the sum of \$619.89, for which said several sums of money, defendant executed his promissory notes. That on or about the tenth day of November, 1868, said buildings were completed. That on the twenty-sixth day of January, 1869, plaintiff filed a *notice* of its intention to hold a lien for said sums of money due it, for said lumber, materials, and labor, amounting to \$1,987.94, and that said defendants Snipes, Curtis & Marlin, have incumbrances on said premises, subsequent to plaintiff's claim. The defendants filed a motion to have plaintiff make its complaint more definite, as to the amount of lumber and materials furnished for each particular building, which motion was overruled by the court, to which ruling defendant excepted.

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Defendant Benjamin E. Snipes, filed a separate answer, claiming, among other things, that he had a lien upon the premises in question, extending to all the buildings and machinery, created on or about the month of July, 1869, amounting to the sum of \$8,000. None of the other defendants filed answers. The cause was heard before the said circuit court, sitting as a court of equity. And it was adjudged and decreed by said court, that the plaintiff recover of the defendant, the Woolen Manufacturing Company, the sum of \$2,246.32 in United States gold coin, with costs, and the same be adjudged to be a lien upon the entire premises, including all the buildings, and the lots of ground upon which the said buildings were situated, including one half acre of ground described, and that the said lien have precedence over all liens after the commencement of said building (except mechanics' lien) to wit: since about the thirtieth day of June, 1867, and that said premises be sold to satisfy the same.

The defendants have brought appeal from the judgment, but it appears from the record that Snipes is the only defendant that filed an answer, and consequently, the only one entitled to appeal, or be heard in this court. No statement or evidence has been returned, and the only ground of error which this court is authorized to examine, must be shown from the records in the case. Upon the argument, the appellant has presented two grounds of error: 1st, that the circuit court erred in overruling the motion to make the complaint more definite; and 2d, that the complaint does not state facts sufficient to authorize the relief granted herein, as against the defendant Snipes. The record discloses sufficient, we think, to permit an examination of both of these questions. It is claimed by the appellants that the plaintiff being a corporation, formed for the purpose of manufacturing and selling lumber, if authorized to take the benefit of the lien law for lumber furnished, cannot take the benefit of such law to secure a debt created for work and labor done in the construction of a building, or for other materials furnished, the same not being within the objects of its incorporation.

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The only allegation in the complaint on this point is as follows: "That the plaintiff is a corporation duly incorporated under the laws of Oregon, for the object and purpose of manufacturing and selling lumber."

The public have an interest in the creation of corporations.

The object of every grant of corporate powers is to obtain a public benefit. The powers granted are the consideration which the public gives for the benefit received or expected. Every application of, or dealing with the capital, or any funds of the corporation, in any manner not distinctly authorized by its charter, is illegal and void. Corporations are created for public reasons alone, and the legislature is presumed in every instance to have carefully considered the public interest, and to have granted just so much power and so many peculiar privileges as those interests are supposed to require. It will not be contended that although the public have an interest in the creation of corporations, it has none in the precise extent of the powers conferred, and that no public policy is concerned in their being strictly confined to the exercise of such chartered powers. To speak of the powers of a corporation we are understood to refer to the privileges and franchises which are created in the charter, and which control and circumscribe the legal acts of the corporate body. Whenever it goes beyond the privileges and franchises therein mentioned, its acts become illegal and void. In the case at bar, so far as we can see from the complaint, the plaintiff only had the right to manufacture and sell lumber.

What portion of the judgment rendered against defendant was for work and labor done and performed, or for other materials furnished by plaintiff, is unknown to the court.

The blending of them together and taking a promissory note for the whole amount, does not necessarily, or by any means, vitiate plaintiff's lien, for the legal part thereof. But as the case now stands, and as it is presented by the proceedings before the court, this objection by appellant appears to be well taken. It is claimed by appellant that

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plaintiff's complaint is defective in not stating the amount of lumber furnished for each particular building.

That the buildings being separate and apart, the lien properly is on each building for the particular amount of lumber furnished for the same. For instance, suppose the main factory building had been completed before the dry house, dye house, or bleach house had been commenced and the defendant should purchase lumber for the purpose of constructing the three last mentioned buildings, and after commencing them, the defendant should mortgage the main factory building, would it be right to allow the plaintiff's lien to extend to the main factory building and destroy the lien created by the mortgage, when no part of the lumber was used on that building?

This would be contrary to the spirit and meaning of the lien law. It was only intended to be a lien on the particular building constructed by means of the labor or materials furnished for that purpose.

Section 1, page 763, of the statute provides, "that any person who shall hereafter, by virtue of any contract with the owner of any building, or with the agent of such owner, perform any labor upon, or furnish any materials, engine or machinery for the construction or repairing such building, shall, upon filing the notice prescribed in the next section, have a lien upon such building."

The above section confines the lien to the building constructed or repaired. This question evidently refers to the particular building upon which the labor was performed, or for the construction or repair of which the materials were furnished, and to no other. It further appears by that section, that the labor must be done and performed, or the materials furnished under and by virtue of a contract with the owner of the building "or with his agent." This contract may be either verbal or written, express or implied.

It is claimed by the respondent, that the dry house, dye house and bleach house were as necessary to the factory as a mill-dam is to a mill, and he refers to 1 Oregon R. 170.

The defendants B. E. Snipes, in his answer, alleges, that

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his lien is on the main factory building and machinery therein, as well as the other property and buildings. Plaintiff's complaint shows that a large portion of its demand was for labor, lumber and other materials furnished for constructing the other buildings, aside from the main factory building. Whether those out-buildings are as necessary to carry on the business of a factory, as a mill-dam is to a mill, the court is not advised. There is one thing certain, which appears from the pleadings in this case, that these out-buildings are separate and distinct from the main factory building.

The first section of the mechanic's lien law, already referred to, only gives the party a lien on *such* building as he performs labor on, or furnishes material for the purpose of constructing, and no other; there is nothing in the lien law in this state which raises the question of necessity. We therefore conclude that this objection is also well taken.

The appellant raises a question also, as to the sufficiency of the complaint, in reference to the allegation of the filing of the notice. The complaint alleges, that on the twenty-sixth day of January, 1869, plaintiff filed a notice of its intention to hold a lien, etc.

Section second, page 764, of the code, provides, that "any person wishing to avail himself of the provisions of this title, whether the claim be due or not, shall file in the county clerk's office of the county in which such building is situated, etc." It does not appear where the plaintiff in this case filed his notice. The section above referred to requires it to be filed in the county clerk's office of the county where the building is situated. This not having been alleged the complaint is defective for that reason. The rule of construction applied to the statute creating this lien, is that it is an extraordinary remedy, created by statute in derogation of the common law, and ought to be strictly construed. See *Parker v. Anthony*, 5 Grays, 289.

For these reasons the judgment of the circuit court must be reversed with costs.

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This decision being made upon the insufficiency of the complaint, and respondent's counsel having made application to amend the same, the suit is remanded to the circuit court and the plaintiffs have leave to amend accordingly.

STATE OF OREGON *ex rel.* J. J. WHITNEY, APPELLANT,
v. S. A. JOHNS, RESPONDENT,

Appeal from Linn County.

APPOINTMENT TO OFFICE.—The appointee of the Governor appointed to fill a vacancy in office occasioned by death or resignation, only holds said office until the first general election after the vacancy occurs.

SUPPLYING IDEM.—At that time the people may supply the office by election.

TERM.—The term of an office attaches to the person of the individual elected to fill the same.

IDEM.—Whenever a county judge is elected his term of office continues for four years, unless terminated by death or resignation.

THE facts are sufficiently set forth in the opinion of the court.

N. L. Butler, District Attorney, *Williams & Willis* and *Bellinger & Burmester*, for the appellant.

R. S. Strahan and *N. H. Cranor*, for respondent.

McARTHUR, J. In June 1866 Burr Morris having received a majority of all the votes cast, was duly elected county judge of the county of Linn in this state. He was qualified, and in July 1866 entered into said office and began to exercise the functions thereof. In September, 1866, Morris died and the Governor of the state of Oregon appointed E. R. Geary to fill the vacancy occasioned by the decease of the said Morris. In June, 1868, S. A. Johns, respondent herein, was elected county judge of said county and being duly qualified entered upon the discharge of the duties of said office in July of said year. On June 6, 1870, J. J. Whitney the relator and appellant having received a

8	833
13	839
13	402
13	404
13	408
22	846
22	347
10*	890
10*	898
10*	899
10*	900
29*	791

State of Oregon v. Johns.

majority of all votes cast for the competitors or candidates for the said office, and having received a certificate of election from the clerk of said county, filed in the office of said clerk the oath of office required by law. On or about July 4, 1870, Whitney demanded of Johns the possession of said office together with the books and papers thereunto belonging. To this demand Johns refused to yield. Whitney thereupon brought an action in the circuit court of the state of Oregon for the county of Linn, as provided by law, alleging Johns to be a usurper and intruder, and invoking the assistance of the law in order to oust Johns from said office, at the same time praying that the title, franchises, etc., of said office be adjudged to be in and belong to him. The court below, after due consideration, made and entered a judgment in favor of Johns. From that judgment Whitney appeals to this court alleging error.

The first question that arises for our consideration is as to the legality of the election of Johns in 1868. Section 14 of article 2 of the constitution of this state, declares, that "general elections shall be held on the first Monday in June, biennially." A general election is one at which the people may fill by election every elective office in the state not otherwise distinctly provided for by the constitution or the laws. Those offices are enumerated and set forth in section 3, p. 697, general laws. Section 11, article 7, of the constitution, fixes the time when such election shall be held. Section 16, article 5, of said instrument provides, that "when, during a recess of the legislative assembly, a vacancy shall happen in any office the appointment of which is vested in the legislative assembly; or when at any time a vacancy shall have occurred in any other state office, or in the office of judge of any court, the governor shall fill such vacancy by appointment which shall expire when a successor shall have been elected and qualified." After the decease of Morris, the then governor, acting within the scope of his constitutional authority, appointed Geary to fill the vacancy. It is contended that by virtue of this appointment, Geary had a right to continue in said office until July, 1870, the

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term of the office of county judge being four years, and he being appointed to fill the unexpired term of Morris. It must, in this connection, be borne in mind, that a general election occurred in June 1868, the same being the one at which Johns was elected. As has before been stated, the governor's act in appointing Geary was lawful and proper, but we are of opinion, that he has no power or authority to fill any vacancy by appointment, which appointment shall extend beyond the general election next following. The power reposed in the executive by section 16 of article 5 of the constitution is not absolute, but limited and qualified, and was only reposed in him for the purpose of filling vacancies in office, until such times as the people, the repository of all power, could act thereon and fill them, as at the recurrence of a general election. The persons so appointed merely hold office temporarily, so that public business may not be retarded or disturbed by the death or resignation of the elected incumbent. As to the appointing power of the governor; it appears from the constitution and from our system of government, that it was the manifest intention of the framers and founders thereof, to restrict the same within the narrowest limits. Indeed the weight of authority very decidedly supports this theory. (*Vide People v. Langdon*, 8 Cal. 15; *People v. Mizner*, 8 Cal. 524-5; *People v. Whitman*, 10 Cal. 46; *People v. Filton*, 37 Cal. 621.) To hold that the power of the governor is so great, that he can prevent the people from selecting their officers at any time, when in so doing the fundamental law is not infringed, would be contrary to the spirit of our form of government. The court below (Boise J.), in passing upon this branch of the case argued as follows: "Section 11, article 7, (of the constitution,) provides for the appointment of county judges by election. Section 14, article 2, fixes the time when such election shall be held. And when any officer is elected for a term of years, which term extends beyond two years (the period between the general elections), and the office to which he is elected becomes vacant, the power to fill such vacancy devolves on the original appointing power, (the

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people,) unless they have delegated that power to some other authority. In this case it is claimed that the governor has that power delegated to him, by section 16, article 5, which provides: "The governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified." Why are the words used "shall expire when a successor shall have been elected and qualified?" The term of the appointee of the governor must, on the theory of the plaintiff, expire at the end of the term of four years from the time the deceased incumbent was elected, and they were not used to prevent an interregnum after the expiration of such term, for that is fully provided for in section 1, article 15. These words have no signification in this place in the constitution, unless they are intended to limit the term of the appointee of the governor, to such a time as the vacancy in the office can be filled by election. The people of Oregon by their constitution made their judiciary elective, and only gave the executive power to fill temporary vacancies, which should occur between elections. If the people had intended to part with this power of appointing county judges, they would have expressed it. It cannot be inferred. No inference or intention is ever presumed against the sovereign. Such is the universal rule for the construction of statutes, for they emanate from the sovereign power which, in this state, is the people. They appoint the executive, and he only acts by delegated authority, and this authority cannot be presumed beyond the express words of the grant. And I think the power in this case only extends to the filling a vacancy until the next general election, when the people can regularly exercise their authority in electing officers. I think it is not reasonable to presume that, where the people have reserved to themselves the appointment of an officer, they would confer on the executive the filling of a vacancy in the office, which would extend the time of the appointee beyond a general election, and deprive the whole people of a county from electing their own local officer, when they could fill it as conveniently as they appointed the original incum-

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bent. If it were not for section 16, of article 5, of the constitution, I think, there would be no pretense but what in case of a vacancy in the office of the county judge, it could be filled at the next general election, because it is a political axiom, that when an office becomes vacant the power that made the office can fill it again. If the people have surrendered that power, it should be by express and unequivocal words. The words are: "The governor may fill the vacancy until a successor is elected." Vacancy in an office means the want of an incumbent at the time. It has no reference to duration of time, and the appointment of a person to fill a vacancy *pro tempore*, does not invest him with a full term, unless the law so expressly provides. Vacancy in an office is one thing, and term is another. An office may be vacant and filled many times during a term of four years.

I am, therefore, of the opinion that the appointment of Geary continued only until the next general election after his appointment, and until his successor was elected and qualified. In the arguments and conclusions reached by the court below upon this branch of the case as set forth above, we fully concur. It follows, therefore, that the election of Johns in June, 1868, was legal.

This conclusion being reached, the next question which is presented is: For what length of time was he chosen? The state constitution, section 11, article 7, provides, that "There shall be elected in each county, for the term of four years, a county judge who shall hold the county court at times to be regulated by law." We have already seen that in case of a vacancy in the office of county judge, caused either by the death or the resignation of the incumbent, the office may be filled by election at the first general election following the death or the resignation, and that the term of the appointed incumbent, the *locum tenens*, then expires. It is also clear that in newly organized counties the office of county judge, as well as each and every other county office, is filled by election at the first general election occurring after the act of the legislature erecting and organizing a new county. The appointees in no instance holding over. It

State of Oregon v. Johns.

is also manifest that the county judge can not be regularly and quadriennially elected in each county throughout the state. In some counties they are elected at one general election, and in others at the next general election. If there was such a thing as a regular term of office disconnected from the person of the incumbent, the elections for county judges would be regular throughout the state, and occur every fourth year from the adoption of the constitution. We are of opinion that under section 11 of article 7, just cited, the term attaches to the person. It is in the nature of a personal franchise which may be terminated by the act of the party himself. He may exercise it for four years. He may resign it. Then he yields it up to the power which conferred it upon him, and the people, if they elect a successor, confer a like franchise upon that successor, and there is no constitutional or statutory prohibition to that successor holding the office for four years, and though such election should occur before the expiration of four years from the last preceeding election, they confer the office for the full constitutional term. Hence we conclude that by virtue of the election in June, 1868, Johns became entitled to hold the office of county judge of Linn County, and enjoy all the franchises of that office for four years from the time of said election. The cases of *Coutant v. The People*, 11 Wend. 512; *The People ex rel. Gallup v. Green*, 2 Wend. 267; *The People ex rel. Aylett v. Langdon*, 8 Cal. 1; *The People ex rel. Ingersoll v. Garey*, 6 Cowen, 642; *The People ex rel. Davies v. Cowles*, 13 N. Y. 350; *The People v. Keeler*, 17 N. Y. 370; *Benton v. Watson*, 4 Texas, 400; *Roman v. Moody*, Dullam's (Texas) R. 512; Texas Digest, 386; *The People ex rel. Brodie v. Weller*, 11 Cal. 77, though not directly in point, are analagous in principle and fully support this conclusion. Counsel for the appellant have cited some very respectable authorities in support of a contrary theory to which, under some circumstances, we would defer, but in this case we cannot, for we are fully satisfied that the conclusion reached is in perfect accord with the spirit of our constitution and laws. The decision of the court below is therefore affirmed.

Murray v. Oliver.

JOHN MURRAY *et al.*, APPELLANTS, v. SAMUEL H. OLIVER
et al. RESPONDENTS.

3 559
5 402
21 338
28 17

Appeal from Benton County.

USURIOUS CONTRACT.—An agreement under the statute of 1854 to compound interest oftener than once a year, cannot be enforced; *but held*, that it does not vitiate the contract as to the principal sum secured and simple interest.

THE facts are stated in the opinion.

Thayer & Burnett, for the appellants.

If the language is ambiguous the plaintiff is entitled to that construction of the contract that will give it legal effect. (3 Cowen, 290; 2 Parsons on Con. pp. 12 and 500; Edwards on Bills, 360; 3 Story, 122; 25 Maine, 401.)

The statute of 1854 fixes no penalty for contracting for excessive interest. The contract is not void. (12 How. 79; 13 Maryland, 203; 9 Peters, 399.)

An agreement to pay compound interest is not usurious. (3 Ohio, 17; 4 Id. 373; 22 Barb. 124; 29 N. Y. 337; 8 Mass. 256.)

Note in hand of innocent purchaser is good unless the statute declares it void. (6 Wend. 615; 2 Hill, 499; Chitty on Bills, 104.)

Severable contract. (10 Pet. 360; 1 Wallace, 222.)

This being a suit in equity on a covenant to pay, the limitation of six years does not apply. (32 Miss. 224; 1 Cal. 497.)

Chenoweth, Stout & Kelsay, for the respondent.

I. The law in force when the note sued on was made, prohibited the making of any contract whereby the interest should be compounded oftener than once a year. (Laws of Oregon, 1856, p. 532, secs. 3-4.)

II. The compound interest demanded in this suit is usurious, being prohibited by statute. (3 Parsons on Cont.

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p. 107; 6 Johns. Ch. R. pp. 314-315; 2 Cushing R. p. 92; 1 Wend. R. 522; 23 Pick. 168; 1 Bovier Ins. 300, 450-4; 3 Parsons on Cont. 108, note; 5 Abbott's Digest, p. 312, sec. 180.)

III. The contract sued on is entire and not divisible, and being illegal, is void. (See 1 Pars. on Cont. 456; 2 Peters, p. 541; 1 Wharton's Law Dictionary, 179; 2 Pars. on Cont. pp. 520-1-2.

IV. This contract not being apportionable compound interest cannot be collected. (As to Statute of Limitation—18 Cal. 482; 9 Texas, 588.)

BOISE, J. This is a suit to foreclose a mortgage executed by the respondent, Oliver, July 26th, 1861, to one Ira Bristol, and by him assigned, for value, to the appellants, July 15th, 1862.

The complaint sets forth the note and mortgage upon which this suit is based, and the respondent Oliver demurs, and assigns as ground of demurrer, that the said note is usurious and void. The court below sustained the demurrer, and gave a decree for the defendants for costs.

The note which is claimed to be usurious is as follows: "\$200.00.

"BENTON COUNTY, OREGON, July 26th, 1861.

"One year after date, for value received, I promise to pay Ira Bristol, or order, two hundred dollars, with interest at the rate of thirty per cent. per annum until paid, and interest to be paid semi-annually, and if not paid when due, the interest to be compounded at the same rate.

"L. H. OLIVER."

We think this contract divisible. There is an agreement to pay the principal and interest at the end of one year from date; then it is stipulated that the interest shall be paid semi-annually, and if not paid when due, the unpaid interest to bear interest at the same rate.

The statute of 1854, which was in force at the time this note was made, provided, that the parties to any note might

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stipulate, that if the interest was not punctually paid, such interest should draw interest and become a part of the principal, but it provided that the interest should not be compounded oftener than once a year; but that statute did not provide any penalty or forfeiture, in case interest should be compounded oftener. It would therefore result in rendering void the contract to pay interest semi-annually, and would not vitiate the contract to pay the principal sum with interest at thirty per cent. It has been held in England and in New York, that an agreement to pay interest upon interest which is to accrue subsequently, cannot be legally enforced; although it does not render the agreement void, so as to prevent the recovery of the principal. Edwards on Bills and Notes, page 358; 5 Paige Ch. R. 98; 1 Barb. 632.) It would seem, then, that if in cases where the law does not allow the reservation of compound interest, in the original contract, that such reservation in the contract does not render the contract void, so as to prevent the recovery of the principal and simple interest; the contract, in this case, reserving interest to be compounded semi-annually. Where the statute provides that it shall be compounded but once a year, does not render void the note, so as to prevent the recovery of the principal and simple interest. It seems to me that the cases are parallel.

In many of the states, the rule in the English law has been relaxed, and compound interest can be reserved on the original contract. (*Pierce v. Rowe*, 1 N. Hamp. 179; *Kennon v. Dickens*, Com. and Nor. Rep. 357; *Greenleaf v. Kellogg*, 2 Mass. Rep. 568.)

It has been held in Ohio, that where there was an agreement to pay annual interest upon the original sum due, and afterwards the parties computed the interest upon the annual interest from the time such interest became due, and included the same amount in a new security, such interest was not usurious.

In the case of *Moury v. Bishop et al.* (5 Paige Ch. Rep.), the chancellor says: "In this state" (New York) "it appears to be settled, that an agreement to pay interest upon

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interest which may accrue after the making of such agreement, cannot be legally enforced, although it does not render the agreement usurious."

And I think the rule in this state, under the statute of 1854, should be, that an agreement to compound interest oftener than once a year, cannot be enforced, but does not render the agreement void as to the principal sum secured, and simple interest is stipulated by the parties.

Judgment reversed.

HENRY HILL, APPELLANT, v. JAMES AND JOHN MELLON,
RESPONDENTS.

Appeal from Polk County.

VARIANCE.—Variance to be material, must have misled the adverse party to his prejudice.

IDEM.—When misled, proof thereof must be made to the court below in order for a party to avail himself of the provisions of section 94 of the Code.

THIS action was originally brought in justices' court, Multnomah precinct, in Polk County, by Hill, to recover \$150, the value of a horse from the Mellons. The defendant James answered, admitting an indebtedness, but claimed an indebtedness from plaintiff on open mutual account of \$214.80, over and above the \$150, claimed by plaintiff. The cause was only tried upon the issues presented, and judgment rendered for defendants.

Plaintiff appealed to the circuit court, when referee was appointed to take the testimony and report the law and the facts. Report submitted at the April term, 1870, with judgment for defendant, in the sum of \$31.33. Objections were filed, and after argument, the court below modified the judgment of the referee, and reduced the same to \$11.23. Plaintiff appeals to this court.

P. C. Sullivan, for appellants. No appearance for respondents.

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McARTHUR, J. It is insisted by appellant's counsel, that there was a total failure of proof in this cause in the court below, or, at least, that there was a fatal variance between the allegations in the answer, and the proofs submitted. The facts are here in the shape of a statement annexed to the record of the judgment. Section 96 of the Code, sets forth what is deemed to be a failure of proof, and the evident meaning of the section is, that, if the proof falls within the scope and meaning of the allegations, variance in some particulars only is not to be regarded as fatal.

It requires no very critical or careful examination of the record and the statement to ascertain that the charge of total failure of proof cannot be maintained. There may, however, have been a variance between the allegations and the proofs, though whether that variance can be considered fatal, or even material, is questionable. The first clause of section 94 of the Code, provides, that "no variance between the allegations in a pleading, and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." And the same section further provides that "when-ever it shall be alleged that the party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon, the court may order the pleadings to be amended upon such terms as shall be just." A party failing to take advantage of the law in these particulars at the proper time and in the proper place in the court below, is himself at fault. The appellant made no application to the court below to enforce the statutory provisions existing in his favor, and it would certainly be a very novel position to assume it to be the duty of the court to apply these provisions, unless moved so to do by the party to whose advantage they would inure. Had an application been made and improperly refused, it would have been error; such, however, was not the case. We are clearly of the opinion that over this matter as presented in this case, this court cannot exercise supervisory control.

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HENRY BECKLEY, APPELLANT, v. M. M. LEARN,
RESPONDENT.

FERRY LICENSE.—Under the statute in relation to ferry license, no person other than the owner of the land can secure a license, unless the owner of the land neglects to apply; and then only upon proof of service of notice. The same rule governs a case where the application is for the renewal of a license.

THE facts are stated in the opinion.

J. F. Watson, for appellant.

Wm. R. Willis, for respondent.

THAYER, J. This is an appeal from the judgment of the circuit court for Douglas County, affirming the decision of the county court upon writ of review.

The appellant applied to the county court of Douglas County, at the February term, 1869, for a ferry license over the Umpqua river, at a point where the road leading from Oakland to Scottsburg crosses the same known as Trenton Ferry.

The respondent applied at the same term of court for the renewal of a license formerly granted to him by the said county court, and which at the time of said application was about to expire.

The appellant stated in his petition for the license that he was the owner in fee simple of the land on both sides of the river at the place where the ferry was established; which fact was conceded, and also that both parties were qualified to receive the license.

The county court considered the two applications together, and awarded the license to the respondents, and the circuit court affirmed its action thereon.

The appellant claims that as he is the owner of the land before mentioned, he is entitled, as a matter of law, to be preferred in his application for the license; while the respondent claims that his application being for the renewal

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of a license, the appellant's ownership of the land gives him no right of preference under the statute.

That such preference can only be claimed upon original application for a ferry license.

These are the only questions to be determined by the court.

The statutes of Oregon regulate the granting of such licenses, and the decision of this case depends mainly upon the proper construction of the statutes referred to.

Section 42, page 869, of the laws of Oregon, provides: "That unless otherwise provided by law, no such license shall be granted to any other person than the owner of the land embracing or adjoining such lake or stream where the ferry is proposed to be kept, unless such owner neglect to apply for such license.

"And whenever application shall be made for a license by any person other than such owner, the county court shall not grant the same unless proof shall be made, that the applicant caused notice in writing of his intention to make such application, to be given to such owner if residing in the county, at least ten days before the term of the court at which application is made."

It will be readily seen from the above section, that no person other than the owner of the land, can secure a ferry license, unless the owner neglects to apply therefor, and then only upon proof of service of notice in writing at least ten days, &c. &c.

It evidently was the intention of the legislature to give such owner of the land decided preference, if he should desire the privilege, and it has been held by reputable authority that he would be entitled to such privilege, independent of statutory provision, though the supreme court under our territorial organization decided in the case of *Grant v. Drew* (1 Oregon, 35), that the right of preference in favor of the owner of the land in such case, was derived wholly from the statute, and that decision has since been affirmed in this court in the case of *Mills v. Learn* (2 Oregon, 215)—while we feel bound by these decisions, whatever views we might

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otherwise entertain, yet, we are satisfied that there are strong equitable claims of preference in such cases, in favor of the owners of the land, and that the right to be preferred, in their applications for license was not intended by the legislature as a mere gratuity.

In the case of *Mills v. Learn*, *supra*, the learned justice who announced the opinion of the court, attempted to demonstrate that the riparian rights of owners of the land, in such cases, had been extinguished. That they had received just compensation for such rights, in the laying out and opening the road landing across the stream, &c., upon which the ferry was proposed to be established.

This reasoning may be entirely correct, although somewhat speculative in adopting it. However, we are necessarily obliged to assume, that the right of preference reserved by that statute in favor of such land owner, constituted a material part of the "just compensation" received by them, for that would very naturally be taken into consideration in the adjustment of their riparian rights.

Again, the court, in the case of *Knott v. Frush* (2 Oregon, 237), directly held that there was a distinction between the ownership of lands embracing or adjoining streams to which ferry rights attach and a license to keep a ferry granted under the statute to a person other than the riparian owner. That in the former case the right descended to the heirs-at-law as incident to the land, in the latter case, the license was a mere personal trust, and terminated with the death of the licensee.

The respondent's counsel urges that as a ferry license may be renewed without notice or petition as provided in section 43, page 869, Laws of Oregon, therefore the owner of the land, upon application for such renewal, is not entitled to the right of preference. Should such owner neglect to apply, the county court would no doubt have the right to renew the license, as the owner would be presumed to know the time of its expiration, and his failure to present an application would be deemed a neglect.

Although not notified as provided in said section 42, we

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cannot see that the provision in said section 43 extends further than this. We deny that because a person other than the owner of the land, has enjoyed the privilege of a ferry license during a specific period, he can claim a higher right to its continuance for another specific period as against such owner—such fact may dispense with notice and other formality for the reason that the same would in such case be unnecessary, but it certainly was not intended to have any greater effect than that. The licensee receives all he bargains for, in the enjoyment of the grant during the term specified in his license, and cannot claim any greater privilege on that account.

He accepted the grant upon the terms imposed by the county court. The tenure was limited, and according to the decision in *Knott v. Frush*, rather precarious, but the acceptance was his own voluntary act, and he has no right to complain so long as he has enjoyed the full benefit of it. The proprietor of the land may have been willing that such licensee possess the right for a limited time. But we cannot presume that he ever has consented to his perpetual use of it. We conclude, therefore, that the riparian owner of the land to which ferry rights attach, may assert a right of preference whenever the county court is free to grant a ferry license, whether it be an original application to establish a ferry or a renewal of a license before granted.

For these reasons the judgments of the circuit and county courts are reversed.

Newton v. Spencer.

ANNA NEWTON, APPELLANT, v. LUCINDA SPENCER *et al.*,
RESPONDENTS.

Appeal from Benton County.

DONATION LAW.—HEIRS OF SETTLERS.—The heirs of those settlers who died prior to Sept. 27, 1850, cannot, under the donation act, inherit by virtue of the residence and cultivation of their ancestors.

THE facts are stated in the opinion.

John Burnett, W. W. Thayer and R. S. Strahan, for the appellants.

Williams & Willis, Jas. F. Watson and L. F. Lane, for the respondents.

BOISE, J. The complaint in this case alleges that the plaintiffs are the heirs-at-law of Hiram and Nancy Allen, deceased. That Hiram and Nancy Allen were married about the year 1838; that in 1847 they settled on said land under the laws of the late provisional government of Oregon; and from that time continued to reside thereon until January, 1849, when said Nancy Allen died; that said Hiram Allen continued to reside on the land with these plaintiffs, who were then minors, until 1863, when he made proofs in the name of Nancy Allen, his deceased wife, and her children (the plaintiffs), of residence and cultivation under the donation law, and then alleges that through fraud, the said patent was afterwards issued to said Hiram Allen and Lucinda Spencer, who married said Hiram in July, 1850, and was his wife at the time of the passage of the donation law and until after the year 1853; and during the whole period, during which the residence and cultivation was completed on said land after the passage of said donation law. And plaintiffs ask to have said patent set aside so far as the same conveys a title to said Lucinda Spencer, and that the court decree to the plaintiffs the full possession and control of said premises.

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To this complaint the defendants demur on the ground that the court has not jurisdiction of this suit; and that the complaint does not state facts sufficient to constitute a cause of action.

The principal question discussed in the argument was, as to the capacity of the heirs of a person who died prior to the passage of the donation law (Sept. 27, 1850), and who died on the land, claiming it under the late provisional government, to hold the land by virtue of the ancestors residence. The language of the fourth section of the donation law (under which the plaintiffs claim) is, that there shall be and hereby is granted to every white settler or occupant of the public lands, etc., "now residing in said territory, or who shall become resident thereof, etc." "Now residing," means, living in said territory. It cannot be said that a person who is dead is residing. The grant was to persons in being, and in case they die before their title has become complete under this law, it provides how the survivor of married persons, one of whom is deceased, and the heirs of such persons may perfect the title of the deceased married person, or ancestor, so as to perfect the title in themselves. But there is nothing in the law which provides for perfecting the title in the heirs of persons who died prior to the 27th of September, 1850, and claiming the land under the laws of the late provisional government of Oregon.

All there is in the act touching this subject, is the provision in the said 4th section: "And in all cases where such married persons have complied with the provisions of this act, so as to entitle them to a grant, as above provided, whether under the late provisional government or since, and either shall have died before patent issues." The words, "shall have died before patent issues," refer to that period of time which may intervene between the completion of the four years' residence and cultivation, ere the time of the issuing of the patent; and being a reference to the future, must have referred to a time subsequent to the passage of the donation law, in which the language was

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written. I think the words, "whether under the late provisional government of Oregon, or since," have reference to residence and cultivation, under the laws of that government, and were inserted to enable the settler who had been on his claim under that government, to count the time of such occupation as a part of the four years continued residence, required to perfect his grant. Without this provision, the old settler, who was on his claim at the passage of this law, would have had to commence his time of residence after the 27th of September, 1850; and I do not think it intended to revive the claims of dead persons, who were once claiming the land without the authority of the United States; for, all the laws of the provisional government relative to the disposal of the lands were void, and could only have vitality by direct act of congress.

This question was before the court in the case of *Ford v. Kennedy*, where it was held that the heirs of settlers, in Oregon, who died prior to September 27th, 1850, cannot inherit by virtue of the residence and cultivation of their ancestors. (1 Oregon, 166.)

Judgment affirmed.

JOHN H. HAYDEN *et al.*, RESPONDENT, v. RICHARD STEADMAN, APPELLANT.

Appeal from Multnomah County.

COLLATERAL UNDERTAKING.—PLEADING.—In case of a collateral undertaking under the statute of frauds, the plaintiff should declare specially.

IDEM.—The complaint must show that a contract was made between the parties, and that it was upon a consideration.

THE facts appear in the opinion.

John W. Whalley, for the appellant.

Aaron E. Wait, for the respondent.

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BOISE, J. The complaint in this case after designating the parties, says: That the said defendant is indebted to the said plaintiffs over and above all payments and offsets, in the sum of three hundred and ninety-two dollars and seventy-one cents, and interest thereon from October 20th, 1869, by balance due upon an account for bill of James Doherty, to the plaintiff aforesaid by said defendant; and for lumber sold and delivered by the said plaintiffs to the said defendant, at his special instance and request; then follows a list of items, among which items is the following, to wit:

“Oct. 31.

“For James Doherty’s bill assumed by defendant. \$215.24

“To interest on James Doherty’s bill 22.00.”

The complaint then proceeds, “That the said defendant has paid upon the foregoing account; at currency rates, the sum of nine hundred and seventy-eight and $\frac{85}{100}$ dollars, including fifty dollars paid upon said bill of James Doherty, and no more, etc,” concluding that there is still due, etc. The defendant demurred to this complaint, and as a special ground of demurrer says, that he demurs to so much of said complaint as relates to the pretended cause of action as set up for a balance due upon an account for bill of James Doherty, to plaintiff, and says that the same does not state facts sufficient to constitute a cause of action.*

*It was held in the circuit court, that there being a general demurrer to the whole complaint, the defendant could not at the same time demur to a particular part for the same cause, i. e., to one of two or more causes of action in the same complaint. That there being a cause of action, as to the lumber, well plead, the demurrer being to the whole complaint must be overruled; the court intimating the opinion that without amendment the plaintiff was entitled under the pleading to recover for the lumber only. The defendant’s counsel appeared no further in the cause, and the plaintiff’s counsel, at his own risk, took judgment for the amount named in the prayer. The appellant relied in this court on the position that his objection to the complaint could be raised at any time, after as well as before judgment, and the question whether he could demur to the whole complaint as not stating sufficient facts, and at the same time to a particular part of it on the same ground, was not raised in this court.

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To this question the attention of this court was particularly directed in the argument, and the other points were abandoned. The court below overruled the demurrer, and gave judgment for the whole amount, including this item.

It appears from the complaint that this bill was originally a debt due from James Doherty to the plaintiffs, which they say the defendant assumed to pay. It was then an undertaking on the part of the defendant to pay the debt of a third person, and the action must, therefore, rest on a contract made by defendant with plaintiffs to pay it, which contract must be got out in substance in the complaint; and it must be shown that the contract was for a good consideration, not mere *nudum pactum*. (1 Chitty's Pleading, 297.)

The plaintiff must set forth everything that is essential to the gist of the action. (1 Jacob Law Dic. 156.) He must show that a contract was made between the parties, and that it was for a good consideration. In this case it does not appear that there ever was any mutual agreement between the plaintiff and defendant, by which the defendant agreed to pay this bill to the plaintiffs, and that the plaintiffs agreed to receive him as their debtor instead of Doherty. In cases of collateral undertaking under the statute of frauds, the plaintiff should declare specially. (Oliver's precedents 236, *note*.)

In this case the plaintiff's complaint does not come up to these requirements, and we think the demurrer was well taken.

Judgment modified.

Pittman v. Pittman.

WM. M. PITTMAN, APPELLANT v. EMILE C. PITTMAN,
RESPONDENT.

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Appeal from Benton County.

DISCRETION.—In all matters of discretion the general doctrine is, that nothing but an abuse of discretion by the court below, will warrant the interference of an appellate court.

CUSTODY OF INFANTS.—The law confers upon the court which pronounces the decree of divorce, the power to make such order for the care and custody of the infants, if any, as shall best subserve their interests.

PRESUMPTION.—The mere fact of awarding the care and custody of the infants to the party in fault, raises no presumption of error.

ABUSE OF DISCRETION.—If error has been committed or discretion abused, it must appear affirmatively. It will not be presumed.

THIS is an appeal from the decree of the court below, dissolving the bonds of matrimony between plaintiff and defendant, and awarding the custody of the two minor children to the defendant. The plaintiff appeals to this court, and relies upon two assignments of error for reversal of the decree.

I. That the court below erred in not finding the defendant (respondent), guilty of adultery.

II. That the court erred in awarding the custody of the two infants to the defendant (respondent).

F. A. Chenoweth and *R. Williams*, for appellant, cited code section 497, subdivision 1, also sec. 535; *B. Monroe*, 164; Paige Ch. 202; 7 Barbour, 640; Dayton on Surrogates, 680.

John Burnett, for respondent, cited 14 Cal. 512; 28 Missouri, 91; Code secs. 497, 498; 10 Georgia, 77; 13 U. S. Digest, 402; 14 Id. 358; and 4 Nevada, 416.

MCARTHUR, J. In passing upon the points presented in this case, it must be borne in mind, that it was heretofore decided that the statement of facts annexed to the record of the judgment herein, did not meet with the requirements of the law, consequently, it will not be considered. The case will be determined upon the record; and, as there is

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nothing disclosed by the record to warrant the first assignment of error, we will pass to the consideration of the second.

It is assumed by appellant's counsel, that inasmuch as the record shows that the defendant was the party at fault, the court erred in awarding the care and custody of the infants to said defendant. And it is sought to base this assumption upon what appears to be a finding of fact recited in the judgment entry. It is claimed also that the court below, having granted the decree of divorce, upon plaintiff's complaint and at plaintiff's instance, was bound, as a matter of law, to award to plaintiff (appellant), the care and custody of the infants. We do not think that these assumptions are warranted by law. Subdivision 1 of section 497, page 271, of the code, vests in the court the power to make such decree "for the future care and custody of the minor children of the marriage, as it may deem just and proper, having due regard to the age and sex of such children, and unless otherwise manifestly improper, giving the preference to the party not in fault." In carrying out this provision of the code, the court is called upon to exercise its sound discretion. In all matters of discretion, the general doctrine is, that nothing but an abuse of that discretion by the court below, will warrant the interference of an appellate court. The record herein discloses no such abuse. It must appear affirmatively, it cannot be presumed; for all legal presumption is in favor of the correctness of the findings and discretion of the court below. The presumption also lies that the court below discharged its duty; that its proceedings were regular, and its action founded upon proper proof.

After the decree of divorce was granted the infants became, as it were, the wards of the court, and it was the duty of the court to make such disposition of them as would be just and proper, taking into consideration their age and sex, and having in view their general welfare. With regard to the care and custody of the children, after a final decree for a divorce or separation, the object is not to gratify the wishes of the parents merely, but to protect and provide

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for the children of the marriage, whose condition cannot fail to awaken the sympathy of the court. (Willard's Equity, 670.) The law confers upon the court which pronounces the decree of divorce, the power to make such order for the care and custody of the infants, as shall best suit their circumstances and best subserve their interests, and it would certainly be acting within the scope of its equity powers, to thereafter annul, or vary, or modify such order, upon proper application and for sufficient reasons. The mere fact of awarding the care and custody of the infants to the party in fault raises no presumption of error or of abuse of discretion. In some cases it would be both, in others neither. As has been before observed, there is no error discoverable in the record of this suit which this court can consider. The presumption is, that the court below examined into all the facts in relation to the fitness and qualifications of the parties for the purpose of making proper disposition of the infants, and acted accordingly; and as nothing appears which tends in the least to overcome the force of this presumption, or of the others above set forth, the decree will be affirmed.

JOSEPH KAFKA, RESPONDENT, v. DAVID SIMON, APPELLANT.

Appeal from Multnomah County.

SET-OFF.—PLEA OF FORMER ACTION.—The action was for merchandise sold to the value of \$432.40, and money advanced to the amount of \$107.80. The defendant answered, denying the allegations of the complaint, and stating that he had, in an action against the present plaintiff, given him credit for \$343 of the claim now made: *Held*, that it was error to instruct the jury that the complaint in the former case did not allege that the then defendant had consented to the set-off; and that if there was no other defense than the former action, the plaintiff in this action was entitled to recover the value of the goods sold and delivered by him.

Mitchell & Dolph, for the appellant.

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THE complaint alleges, in substance, that the plaintiff during the years 1867 and 1868, sold the defendant produce and goods of the value of \$432.40; and advanced him \$80.50 coin, no part of which has been paid.

The answer denies the allegations of the complaint, and alleges as separate defenses:

1st. That defendant, during the years 1867 and 1868, sold plaintiff merchandise of the value of \$565; and that during the same years, plaintiff paid the defendant, partly in produce and partly in money, \$343, and no more; and that said produce and money so paid defendant, is the same produce and money mentioned in the complaint in this action.

2d. That before the bringing of this action, the defendant had commenced an action against the plaintiff for the unpaid balance of his said account, in justice's court for Central Portland Precinct, Multnomah county; and in his complaint in that action, had given plaintiff credit for said sum of \$343 in currency, so paid in produce and money; and that plaintiff had filed his answer in said action, admitting such payment, and claiming a greater payment—(copies of the pleadings in the former action being attached to the answer)—and that judgment had been rendered in said court in favor of plaintiff in said action, the defendant herein, for the sum of \$166.50 damages, and \$14.50 costs. That said produce so credited is the identical merchandise sued for in this action.

It is evident from the pleadings in the former suit, that this plaintiff received credit in that action for \$343 claimed in this; that it was credited with his consent, because he filed an answer, in which he admitted that that amount had been paid in produce by him.

The court erred in refusing to instruct the jury, as requested, in writing, by the defendant:

“1st. That if the jury are satisfied that any portion of the plaintiff's account, set up in the complaint, was allowed the plaintiff as a credit in the complaint in the former action, the plaintiff cannot recover in this action for the same items.

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"2d. That if plaintiff and defendant, during the times mentioned (in the pleadings) had mutual accounts, and the items set up in the complaint were received by Simon to apply on account, then, so far as the same were allowed Kafka in the former action, the plaintiff cannot recover for them in this action.

"3d. That the former action set up in this action is a bar to any recovery in this action."

"4th. If the produce furnished the defendant by the plaintiff was placed to his credit on account, with plaintiff's consent, and allowed in the former suit, plaintiff cannot recover for the same items in this action."

5th. The court erred in instructing the jury "that there was no question raised by the pleadings as to whether the produce received by the defendant was received upon account of goods sold by defendant to plaintiff, and allowed plaintiff in the former action; and that the jury had nothing to do with that question." To which charge, defendant, by his counsel, duly excepted.

6th. The court erred in instructing the jury as follows: The effect of withdrawing the answer was to leave the same matters to be determined in that case, as if no answer had been filed. It is not alleged in the complaint that a balance between the parties had been struck, or agreed upon, and it is not alleged that Kafka had agreed to set off his demand. But the record in that case does not show that the question was adjudged and determined in that action. If Kafka had a valid and subsisting claim against Simon for produce sold and delivered, he could either plead it as a set off, or keep it as a foundation for a new action. If he had such a claim, he is not barred by that record from recovering for the produce so sold to Simon."

An agreement that goods furnished by the debtor shall go in satisfaction of the debt is equivalent to an actual payment to that extent. (Smith's Mercantile Law, 657, n. 2; *Hooper v. Stephens*, 4 Ad. & E. 71; *Hart v. Nash*, 2 C. M. & R. 337.)

The appellate court had no power to allow the answer in

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the former action to be withdrawn; and the withdrawal of said answer could have no other effect than abandoning the appeal, leaving the judgment of the court below to be affirmed.

The statute (page 597, sec. 77) contemplates that an action appealed from justice's court, shall be tried in the appellate court upon the same issues made in the court below; and it must be too apparent to require argument, that the judgment of the appellate court must be a final determination of all the issues made and tried in the justice's court. Neither party can make new issues; neither party, it appears to us, can avoid the effect of the former adjudication upon the issues already made, except by a reversal of the former judgment upon the appeal in the same action.

So far as the subject matter in controversy has been once adjudicated upon, the parties are concluded by it. (*Gardner v. Buckbee*, 3 Cowen, 120; *Wright v. Buller*, 6 Wend. 289; *Etheridge v. Osborn*, 12 Wend. 399; *Gray v. Dougherty*, 25 Cal. 266; *People v. Supervisors*, 27 Cal. 655.)

J. G. Wilson, for the respondent. To sustain a plea of a former adjudication, it must appear that the actual point in issue between the parties had already been determined, and such determination must have been on the merits. (15 Iowa, 30; 14 Id. 379.)

It is immaterial whether parol evidence may or may not be admitted in a proper case, to show what transpired on a former trial, when the former pleadings are insufficient to embrace the matter in question.

The record shows that this cause of action was not a matter that could be determined in that action after the answer was withdrawn by leave of the court. Had the former action been for a balance alleged to have been agreed upon, the appellant's argument would hold good, and a judgment by default would be a bar.

But there is no allegation in the pleadings, in either action, that the parties had accounted together, or agreed upon a balance; nor that there ever was any agreement that

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the merchandise sold by this plaintiff should be applied on account, or in payment.

The present action is an independent claim for goods sold, which Kafka had a right to plead as a set-off in the former action, or to reserve for the foundation of this action. (Code, secs. 71 and 72.)

Kafka's answer being withdrawn, there is not a statement in the pleadings in either action to indicate an intention of either party to apply these goods in payment, or on account, or as a set-off. And it is not in the power of a plaintiff to compel a defendant to plead his set-off in such a case, or to plead it for him. To embrace the matter in his complaint, he should have alleged that the defendant had agreed upon a balance, or he should have shown by his pleading that there was an agreement that the goods sold should be applied on account.

The statement in the answer which was withdrawn, may be an admission that would be evidence in a proper case, but after the answer was withdrawn by leave, it was no longer a pleading in the case, and it is not alleged in any pleading in either case that the goods were applied in payment. The motion for leave to withdraw the answer was addressed to the discretion of the court. The record shows that Kafka's motion for a continuance had been denied, and the presumption in favor of the record is, that the leave was granted for good cause.

To hold that the then defendant could be compelled to litigate his set-off in that action, when he had obtained leave of the court, and had withdrawn his answer, and had allowed judgment to go against him for want of answer, would make the granting of leave a nullity, and would establish the doctrine that the parties can make a record without pleadings.

There is no issue in the present case which would warrant any evidence as to goods sold by Simon to Kafka, or any instructions asked with reference thereto.

The charge of the court below fully covered all questions arising on the subject of application of accounts or money, in payments of indebtedness, in the first instructions given, and it was not error to refuse to re-give them.

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It is true that in the former action Simon made no allegation that there had been an accounting, or that the goods were sold to him on account, or that Kafka had consented that they should be applied on account, or should be set off. It is simply a complaint for goods sold and delivered, containing naked admission of part payment. It was not error to instruct that under that complaint the judgment was not a bar to this action.

THAYER, J. This was an appeal from a judgment recovered in the circuit court for Multnomah county, in which the respondent, Kafka, was plaintiff, and the appellant, Simon, was defendant. Plaintiff alleged in the complaint, that during the years 1867 and 1868 he sold to the defendant goods, wares and merchandise, amounting in the aggregate to \$432.40 in United States currency, and during the same time advanced to the defendant \$107.80 currency, no part of which had been paid. The defendant in his answer denied the allegations in the complaint and averred, that during said time, he sold to the plaintiff goods, wares and merchandise to the value of \$565; that plaintiff had paid to apply thereon in money and produce the equivalent of \$343 currency; also, that the defendant, before the commencement of this action, commenced an action against the plaintiff for the unpaid balance of his said account, in a justice's court in Multnomah county, and that in his complaint therein he gave credit for the said sum of \$343 currency, the amount so paid, and in the action in said justice's court, recovered judgment for the sum of \$166.50, besides costs. That said Kafka appealed to the circuit court of Multnomah county. That when the appeal was perfected, Kafka obtained leave from the court to withdraw his answer, whereupon Simon obtained judgment for the sum of \$222 and costs. That the merchandise, produce and money for which this action was brought by Kafka was the same which was credited him by Simon in the justice's court, and on appeal to the circuit court, where the answer was withdrawn, and the defendant Simon claims that the same was a bar.

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Plaintiff, Kafka, in his reply, admitted the recovery of the judgment in the justice's and circuit courts, and claimed that he had paid Simon more than \$343. That he had sold and advanced to him in goods and cash to the amount of \$542.20 currency. There was no denial in the reply of the allegation in the answer that the credit given by Simon in his complaint for merchandise, produce and money, was the same for which this action was brought, and it appeared that the only issue between the parties, in the justice's court, upon that point, was whether Kafka was entitled to be credited for more than \$343.

Simon claimed that he should be allowed in this action the amount he had credited Kafka in the former action in the justice's court, and on appeal to the circuit court. Several questions were raised upon the trial by Simon's counsel, which are presented by the bill of exceptions. The court has not deemed it necessary to examine any more than the following. After the jury retired they came in for further instructions, and the foreman asked the court as follows:

"If I am satisfied that the plaintiff has been allowed by Simon in the first suit for the produce, should the jury give the plaintiff a verdict for the same produce?"

The judge, in reply, charged the jury, that they had nothing to do with what Simon undertook to set off in the former case; that the complaint in that case did not allege that Kafka had consented to set off his claim, and that if there was no other defense than the former judgment, all they had to do, was to ascertain whether the plaintiff had sold and delivered to defendant produce, and if any, how much and what was its value, and to render a verdict accordingly. This charge was duly excepted to by Simon's counsel.

The jury returned a verdict for \$155.98 in favor of Kafka.

We think this charge was erroneous; that under the circumstances of this case, Kafka would have no right to recover upon a claim which had already been allowed him and of which he had received the full benefit. The circuit court

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seems to have gone upon the theory, that unless the merchandise and produce for which this action was brought had been received by Simon under an agreement, that it should be received, in payment of the merchandise, etc., he had let Kafka have, it would be no defense, although Simon had actually allowed Kafka therefor in the former action. This is evident, from the fact that the court was requested to charge, that if the jury was satisfied, that any portion of Kafka's account, had been allowed by Simon as a credit in the complaint in the former action, that Kafka could not recover in this action for the same items, and refused to do so. It is true, no doubt, that when there are mutual independent claims between two parties, that neither can sue the other and compel him to bring in his claims as a set-off or counter claim. But by examining the pleadings in the case in the justice's court, which were made an exhibit in Simon's answer herein, it will be seen that Kafka clearly admits that the produce, etc., was received by Simon in payment of his claim against Kafka.

The language of Kafka's answer in the former case in the justice's court is, that he denies that he has paid, on account of the merchandise, etc., no more than \$343, in currency; but says he has paid plaintiff Simon, in merchandise, produce and cash \$500, currency. This presents the following state of facts: Simon sues Kafka for a balance upon merchandise sold, admitting in his complaint that Kafka has paid him, to apply thereon in a certain manner, \$343. Kafka says, by his sworn answer, that he has not only paid him that amount, but more—to wit, \$500. The issue is tried; Simon gets a judgment for the balance of his account, after allowing the \$343. Kafka appeals, and after the case reaches the appellate court, obtains leave to withdraw his answer, and Simon takes judgment for such balance. After all this has occurred, Kafka claims the right to recover, in another action against Simon, the same amount allowed him in the former, and not allow Simon to claim the same as any defense. It is the opinion of this court, that Kafka, under the circumstances mentioned, is precluded from saying that the

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merchandise, produce and money for which this action is brought, was not received by Simon to apply as payment upon the merchandise, etc., that he sold to Kafka.

For these reasons, the judgment of the circuit court is reversed and the cause remanded to the court below for a new trial.

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L. A. SEELEY, APPELLANT, v. DANIEL SABASTIAN,
RESPONDENT.

Appeal from Clackamas County.

RETURN.—The return of service of notice of appeal being imperfect may be amended so as to conform to the facts.

ORDER ENLARGING TIME.—An order enlarging the time within which the statement of facts is required to be made and served, must be made within the time prescribed by law for the performance of these requirements.

RESPONDENT's attorney filed a motion to dismiss this appeal, for the reason, that there had been no proper and sufficient service of the notice of appeal. Pending the argument upon said motion, appellant's attorney asked and obtained leave of court to file a cross motion, requesting permission to amend the return on said notice so as to conform to certain facts presented. Respondent's attorney also filed a motion to strike from the files the statement of facts accompanying the record, for the reason that the same was not served within the time prescribed by law.

J. H. Stinson, for appellant.

Benton Killen, for respondent.

MCARTHUR, J. It was ruled in *Dolph v. Nickum* (2 Ogn. 202), that this court could and would, in furtherance of justice, allow the return of service of notice of appeal to be amended so as to conform to the facts.

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In this case the return is to some extent imperfect, but it appears that it can be amended so as to meet the fullest requirements of the law, and at the same time conform strictly to the facts. From an examination of the record we are satisfied that by denying the motion, we would hinder rather than further justice, and as no sufficient reasons are urged to warrant a departure from the rule in the case cited, we will allow the motion. The return may be amended. Allowing this amendment, necessarily disposes of the respondent's motion to dismiss, therefore we proceed to the consideration of the motion to strike from the files the statement of facts. The record discloses that the decree in the court below was entered on Thursday, March 30, 1870; also that on May 10, 1870, the judge made an order enlarging the time for making, filing and serving the statement of facts until May 20, 1870, and also that service thereof was made May 19, 1870. Section 526 page 280 of the code as amended in 1866 (see law of Oregon 1868 p. 159), declares, that when a party "wishes a statement of the case to be annexed to the record of the judgment, decree or order, he shall within twenty days after the entry of such judgment or order prepare such statement," and he "shall serve a copy thereof upon the adverse party." In this case it appears that after the expiration of the twenty days, within which the statement of facts is required to be made and served, an order was granted enlarging the time for making and serving the same, such order falling within the scope and meaning of that part of the section of the code above cited, which provides, that "the several periods of time above limited may be enlarged, upon good cause shown by the judge before whom the cause was tried." Inasmuch as the time prescribed by statute had expired before the enlarging order was made, it is insisted that the said order was *ipso facto* void, and that the statement of facts accompanying the transcript, should be considered a nullity and stricken from the files. A similar provision to the one cited exists in the laws of California (see section 340, Civil Practice Act), and the supreme court of that state in the

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case of *Leach v. Allen* (2 Cal. 95), upon a point similar to the one presented in this case said: "If the appellant allow the twenty days to expire after taking the appeal, without framing a case, he waives his right to have the case stated, and a subsequent order of the court made without notice to the respondent allowing further time to make up the statement, is a nullity." In the case under consideration, no notice of the application for an order enlarging the time, was served. Under the practice in this state, it is questionable whether such notice would have had any legal force whatever, although upon this point we do not pass. *Bryan v. Maume* (28 Cal. 238) is an analogous case, and the same conclusion is substantially reached as in the case above. In *Lindley v. Wallis* (2 Ogn. 204) it was held by this court, "that the application for extension of time for completing and filing the transcript must be made *within* the time prescribed for the performance of these requirements." The analogy between that case and the one now before the court is perfect, and by a parity of reasoning, the only conclusion that can be logically reached is, that the order enlarging the time within which the law required the statement to be made and served, must be made within the time prescribed for the performance of said acts, that is to say, before the twenty days have expired. It follows therefore, that the motion to strike the statement of facts from the files should prevail. It is so ordered.

THOMAS HOWARD AND WIFE, APPELLANTS, v. E. M.
BAMFORD, RESPONDENT.

OUTSTANDING WARRANTS.—HOW PAYABLE.—Where there are outstanding warrants against a school district, the clerk may pay those first presented. It is not necessary that the money of each year be exclusively applied to pay for schools taught during the year in which it was levied.

MANDAMUS.—Where the clerk has money in his hands applicable to the payment of a warrant, which upon presentation he refuses to pay, the proper remedy is by mandamus.

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THE facts are stated in the opinion of the court.

Baldwin & Hyde, for the appellants.

The person legally liable is the person to be made defendant. (1 Chitty on Pl. pp. 34, 39, 123, 352, 353; 1 Smith's Leading Cases, 416, 719; 3 Barb. 475, 480.)

The answer is insufficient. (32 Cal. 450; 14 Id. 258; 23 Id. 338; 9 Id. 33; 21 Id. 215; see Code, p. 335, sec. 349.)

O. Humason, for the respondent.

BOISE, J. . The facts in this case, as shown by the pleadings, are as follows:

The respondent, E. M. Bamford, was clerk of school district No. 1, in Grant county, in the year 1869. In that year the directors of said district employed one of the plaintiffs, Martha J. Howard, to teach a school in said district, for three months, agreeing to pay her therefor the sum of three hundred dollars, and she taught said school, and on the ninth day of July, 1869, the directors of the district, executed and delivered to her an order for three hundred dollars, on the said clerk, which order was for said services as teacher.

About the eighth of March, 1870, the respondent, as such clerk, drew from the county treasury, upon the order of the county superintendent of common schools, the sum of ninety dollars in coin and one hundred and seven dollars in legal tenders, and on that day another order in favor of R. B. Owens, issued in 1868, by said school directors, on the clerk of said district, was presented to the respondent, and the money in his hands belonging to said district, was paid thereon, which was prior to the presentation of the order to him of said Martha J. Howard—which last order was refused to be paid for want of funds.

We think that under this state of facts the clerk would not be responsible in this form of action. He would not be called on to pay out money which he did not have, and we

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think that were there any out-standing warrants against a school district, the clerk may pay those first presented; and that it is not necessary that the money of each year be exclusively applied to pay for schools taught during the year in which it was levied.

Second: We think that had there been money in the hands of the clerk applicable to the warrant of the plaintiffs, and he had refused to pay it to them on the presentation of the warrant, their remedy would be by mandamus, and not in this form of action. The funds in the hands of the clerk are the property of the district, and do not, by the drawing and presentation of an order, become money in his hands, had and received to the use of the holder of the warrant. They remain public funds in his hands until he parts with the custody, or sets them apart to the use of another and becomes his voluntary agent. The clerk of a school district is an officer, and the same rules must apply to and govern his conduct, as those which apply to county treasurers and the treasurer of state.

To hold that those officers were liable to an action for money had and received in every case where questions of doubtful appropriations arise, and from uncertainty they refuse to pay a warrant, would, we think, be a bad practice; that the usual and better mode is to proceed by mandamus.

Judgment affirmed.

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WOOD, RESPONDENT, v. FITZGERALD AND WINGATE, APPELLANTS; AND MAYS, RESPONDENT, v. FITZGERALD AND WINGATE, APPELLANTS.

*Appeal from Wasco Circuit Court.**

LIMIT TO INQUIRY.—In contested election cases the law limits judicial inquiry to the votes returned upon the poll books.

RESIDENCE.—Though an employee of the United States or state government cannot "gain or lose a residence by reason of his presence or absence while employed in the service," yet he can establish his domicile, and gain a residence, at such a point as he may desire, by taking the proper and appropriate steps to do so, independently of his employment.

PARDON.—A general, absolute pardon, relieves the person to whom it is granted, not only from imprisonment, but from all the consequential disabilities of the judgment of conviction, and restores such person to the full enjoyment of his civil rights.

IDEM.—Article II, section 3, of the state constitution, does not operate as a restriction or limitation upon the effect of a pardon.

XV AMENDMENT TO CONSTITUTION OF UNITED STATES.—The fifteenth amendment to the federal constitution is a part of the supreme law of the land, and its effect is to annul those provisions of the state constitution, and those enactments of the state legislature, which restrict the exercise of the right of suffrage to white persons.

RESIDENCE.—PRECINCT.—Where an individual has established for himself a settled residence and a fixed domicile in any precinct in a county, there he must vote; where, however, an individual is a *bona fide* resident of a county, but has no fixed residence or domicile in any particular precinct therein, he may vote in any precinct in which he may find himself on the day of election.

NATURALIZATION.—By being naturalized an alien becomes instantly a citizen of the United States, and of this state, and as such has a right to vote for county officers at any election, at which such officers are to be chosen, occurring after his naturalization, if he has the necessary qualification as to residence in the state and county.

COSTS.—In cases of contest of election under title V of chapter 13 of the general laws, costs and disbursements cannot be recovered.

* *Darragh*, appellant, v. *Bird*, respondent; *McFarland*, appellant, v. *Holland*, respondent; *Grant*, appellant, v. *Ruch*, respondent; *Wood*, respondent, v. *Fitzgerald* and *Wingate*, appellants; and *Mays*, respondent, v. *Fitzgerald* and *Wingate*, appellants, were all contested election cases appealed from Wasco county. The case of *Darragh v. Bird*, was withdrawn. That of *Grant v. Ruch*, dismissed. The other cases were argued at length. For convenience the cases of *Wood v. Fitzgerald* and *Wingate*, and *Mays v. Fitzgerald* and *Wingate*, were considered at the same time, and are reported together. In the case of *McFarland v. Holland*, the respondent prevailed. No report of this last named case is deemed necessary, as the points passed upon therein are embraced in the cases reported.

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THE facts are sufficiently set forth in the opinion.

O. Humason and N. H. Gates, for appellants.

J. G. Wilson, for respondents.

Counsel joined in one brief, citing constitution of Oregon, sections 2, 3, 4, 5, 6, p. 101; sec. 17, p. 103, and sec. 14, p. 110; Laws of Oregon, p. 696, 707, 708; sec. 13, p. 700; sec. 11, p. 699; sec. 18, p. 701; sec. 354, p. 237; 4 Cal. 175; 28 Cal. 123; 4 Barb. 504; 1 Kent, 86; 2 Kent, 431; 10 Iowa, 308; 19 Wend. 11; XV Amendment; Constitution IX and X Amendments; Reconstruction Act; McPherson's Manual, 1869, p. 448 and 457.

MCARTHUR, J. At the regular biennial election, held June 6th, 1870, E. Wingate and E. P. Fitzgerald; and Edwin Wood and Robert Mays, were candidates for the offices of county commissioners of Wasco County. On June 14th, 1870, the board of canvassers, as provided by law, canvassed the votes polled at said election, and found that Wingate had received 314 votes; Fitzgerald, 316; Wood, 311, and Mays 303. Thereupon Fitzgerald and Wingate were declared to be elected, and certificates of election were accordingly issued by the clerk of Wasco County. On June 28, 1870, Wood and Mays commenced proceedings to contest the election of said parties, in the manner prescribed in title 5, of chapter 13 of the general laws. The cases were submitted at the same time, and the court below, after casting out what it adjudged to be the illegal votes polled and counted for each of the said parties, arrived at the conclusion that of the legal votes cast, Woods had received 311, Mays 303; Fitzgerald 301, and Wingate 298. Wood and Mays were accordingly adjudged to have been duly and legally elected, and to be entitled to the offices of commissioners of Wasco county. From this judgment Fitzgerald and Wingate appeal.

The first point presented is one of interest. On the trial of these causes it was insisted by appellants' counsel that

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the votes of J. Ross, D. Lynch and William Sullivan should be added to the number polled for appellants; and it was as strenuously insisted by respondents' counsel that the votes of R. Graham, D. L. Reynolds, J. A. Foot, J. S. Morgan, P. Runey, A. Biddle, J. S. Paddleford, Wm. McKay and others—in all nineteen—should be added to the number polled for respondents. The names of these parties do not appear upon the poll books; but it is claimed that their votes were illegally rejected by the judges of election. The court below refused to count them, and as a reason for such refusal declared, in substance, that in its opinion the late limited judicial inquiry to the votes returned upon the poll books. And this ruling it is charged was erroneous. An examination into the duties of the judges of election, and the rights of electors is necessary, in order to arrive at correct conclusions on this point. It is the duty of judges of election to receive all votes offered and cause them to be entered upon the poll books by the clerks. If a challenge is interposed and insisted upon, it becomes the duty of said judges to tender to all persons offering to vote the oath prescribed and set forth in sec. 13, p. 700, general laws. If the person so challenged fails or refuses to take the prescribed oath, the same section declares that his vote shall be rejected. By sec. 14, p. 700, it is enacted that even if the person challenged takes the prescribed oath, further inquiry may be made into his qualifications, and if a majority of the judges are of opinion that he does not possess the qualifications of an elector, his vote shall be rejected. Though such an one is rejected and excluded from voting, sec. 18, p. 701, requires his name to be entered on the poll books as a rejected voter. It is also provided that the names of the persons for whom he intended to vote shall be taken down, the evident intention of the law being to have preserved a complete record of all rejected as well as all accepted votes. The wisdom and policy of this enactment is very apparent. Proper compliance with it facilitates judicial inquiry when necessary into the rights and qualifications of the voter, and at the same time tends to prevent improper

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action on the part of judges of election. In refusing to record the votes of the persons named, the judges acted in direct contravention of law. They should have been received and entered upon the poll books as rejected voters. It is urged that notwithstanding the failure on the part of the judges to comply with the law, these votes should be counted, the evidence showing that they were properly offered and improperly rejected, conceding that the evidence is entitled to all the weight claimed for it, we find no authority for so doing. Cases of this nature must be heard and determined "in such a manner as shall carry into effect the expressed will of a majority of the legal voters, as indicated by their votes." (General laws, sec. 41, p. 708.) This *expressed will* can only be gathered from the poll books, and a vote must be recorded before it can be said to have obtained such an expression as the law contemplates. In contests such as this, the main question is, which candidate received the highest number of legal votes cast. It is claimed that the persons named did all they could to express their will and intention on election day; and that as the evidence shows they were qualified voters, their votes should be counted. It is unnecessary to discuss the evidence. Suffice it to say it is exceedingly unsatisfactory, and we cannot give it the weight which counsel claim for it. Besides, we are clearly convinced that it would be productive of ar-rant fraud and gross perjury to establish the rule that the courts could properly count the vote of a person who did not vote at the time of the election, and whose name is not to be found on the poll books, leaving it to be ascertained subsequent to the election from the testimony of such person himself in whose favor his vote would have been cast. If such a rule should be established, it would be both possible and probable that the result of elections, as declared by the board of canvassers and the will of the people, as expressed by the poll books, would frequently be changed and thwarted through the contrivance of the judges and the ready testimony of suborned witnesses. In refusing to count the votes of these persons, the court below did not err.

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It is claimed by appellants' counsel that the court below erred in refusing to deduct the votes of B. P. Cardwell and Jacob Fritz from respondents' tally, for the reason that the evidence establishes the fact that they are employees of the United States government, and consequently disqualified by article I, section 4, of the state constitution, which declares that "for the purpose of voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, or of this state," and etc. B. P. Cardwell came to Wasco County from Portland more than ninety days before the election, and brought with him his family. At the date of the election and for a long time prior thereto, he was and had been the deputy of the United States assessor and collector of internal revenue. The court below found that the transfer of his domicile from Portland to Wasco County was accompanied by such appropriate acts on his part as to leave no doubt that it was a *bona fide* change of residence. Jacob Fritz came to Wasco County in 1863, and was at that time a private soldier in G company of the Fourth Infantry of the United States regular army, and in 1865, his term of enlistment having expired, he was honorably discharged from the military service. Subsequently he was employed as a civilian by the proper authorities to take charge of the abandoned military post and reservation adjacent to the Dalles; he discharged no military duty whatever, but acted simply as a sort of keeper and protector of the government property in about the post abandoned. He continued to reside in Wasco County almost uninterruptedly from the time of his discharge from the military service until the day of the election, a period of almost five years. Both these individuals were employees of the United States government and in the civil service. The facts being as above set forth, the question arises as to the applicability and effect of article II, section 4, of the state constitution to and upon the persons so situated. We cannot see the legal force or propriety of placing such a construction upon that section as would preclude an em-

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ployee of the United States or state government from making any change in his domicile that he may desire to make. Though such an one cannot gain or lose a residence by reason of his presence or absence when employed in the service, yet he can establish his domicile and gain a residence at such a point as he may see fit, by taking the proper and appropriate steps so to do independently of his employment. In *The People v. Holden* (28 Cal. 137,) it was decided that section 4, of article II, of the constitution of California, (the language of which is almost identical with that of article II, section 4, of the constitution of Oregon,) does not add to or take from the conditions upon which the fact of residence is made to depend; and it was held that that section meant simply that in determining the fact of residence, presence or absence in the service of the United States shall not be taken into account, or in other words, neither presence nor absence in the service of the United States is a condition upon which the fact of residences can be affirmed or denied. It sufficiently appears that both Cardwell and Fritz had acquired a legal residence in Wasco County prior to the election. This they had a right to do; nor can any such interpretation be put upon the section of the constitution referred to as would prevent them from acquiring such residence, or from removing their residence from the locality at which they were domiciled at the time they entered the civil service of the United States government. They voted at the election, and had a legal right so to do, and the court below did not err in refusing to strike their votes from the number returned, as cast for the respondents.

Among those who cast their votes for the appellants was one Mathias Meng. On June 26, 1867, Meng was convicted of the crime of arson in the circuit court of the state of Oregon, for the county of Wasco. He was subsequently sentenced to imprisonment in the penitentiary for the term of five years. On September 25, 1867, and before the expiration of his sentence, he was pardoned by the governor of the state, and was released from imprisonment. The pardon was general and unconditional. Upon these facts,

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the court below held, in substance, that while the pardon remitted the punishment and blotted out the offense for which Ming was incarcerated in the penitentiary, yet it did not restore him to his political rights; they had become forfeited and that there was no provision in the constitution or the laws that authorized or warranted their restitution. We cannot yield our assent to this proposition. The doctrine of pardons, as now recognized and applied by civilized nations has its origin in Divine law, upon which it rests, the merciful administration of human justice, and finds its sanction in the rules of political and social ethics, which have been firmly established and approved by the wisdom of ages. The pardoning power has been exercised from time immemorial by the sovereigns of those nations who have made any advancement whatever in the science of human government. Although it is liable to great abuse, yet, from the very necessity of things, no government could be said to be well ordered, without leaving this power somewhere vested. Every one who has made well directed investigations into this subject must, we think, reject the idea that the pardoning power is vested in the sovereign or executive solely with a view that its exercise may relieve convicted criminals from the punishment which the law inflicts as a consequence of their adjudged guilt. The administration of human justice being necessarily imperfect, it sometimes happens that from a combination of untoward circumstances, innocent individuals are adjudged to be guilty of the commission of crimes of which they are in reality innocent. Though such instances are of rare occurrence, the fact that they have occurred, and are likely to again occur, forbids that we should refuse to admit the fearful truth. The government so organized and administered as to preclude the possibility of relief to one thus unfortunate would present a very lamentable spectacle. It would defeat one of the main objects for which governments are formed—that of promoting the individual and collective happiness and welfare of mankind. The necessity and efficiency of the pardoning power will be much more readily acknowledged when it is

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exercised to prevent injustice; it being ascertained that an error of the kind referred to has been committed; than when it is invoked to temper the judgment which the law has pronounced upon one whose guilt is established beyond peradventure. In the one case it should be extended as a matter of right, in the other, a matter of grace and mercy, it should be exercised with care and discrimination. Article V, section 14 of the state constitution vests in the governor in very general terms the power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason. Article II, section 3, of the same instrument, declares that the privilege of an elector shall be forfeited by a conviction of any crime which is punishable by imprisonment in the penitentiary. As before stated, Meng was convicted of the crime of arson—a crime punishable by imprisonment in the penitentiary, and after such conviction, the governor moved by merciful consideration, granted him a general, absolute pardon. The question therefore arises, did the pardon restore to him the privileges of an elector, which were forfeited by his conviction of the said crime, or did it operate solely to relieve him from the corporal punishment of incarceration, leaving him to suffer all the other consequences flowing from such conviction. After careful consideration of the law as it exists, and the abundant authorities on this point, we can arrive at no other consistent or satisfactory conclusions than that a general absolute pardon relieves the offender not only from imprisonment but from all the consequential disabilities of the judgment of conviction, and restores him to the full enjoyment of his civil rights, with this restriction merely: "That it cannot divest any person of any right or interest, which the law has permitted to be acquired and vested in consequence of the judgment," (4 Blackstone's Commentaries, 402; 8 Bacon's Abr. Title Pardon; Hawkins' Pleas of the Crown, Title Pardon, b. 2, c. 37, sections 34 and 54.) It seems to us that it would be a cause of profound regret if the law were otherwise. In *The People v. Pease* (3 Johnson's Cases, 333-4), the inquiry of the court was directed towards ascertaining whether the pardon of

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the governor did away with all the consequent legal disabilities which attached to one convicted of an infamous crime. It was held "That the disabilities formed no part of the judgment against a convict, but are the legal marks of infamy which it fixes upon him. When, therefore, the judgment is pardoned, the legal infamy flowing from it is equally disposed of by the pardon." The Court further declared the proposition that the judgment to which those disabilities are merely consequential can be released, and yet the disabling effect thereof remain, to be untenable. In *the matter of Deming* (10 Johnson, 233), the court wisely said that "policy and humanity require that we should give the convict so pardoned as complete a restoration of his private rights as may be consistent with the intervening rights and interests of others," and it held "that the effect of the pardon was to acquit the offender of all the penalties annexed to the conviction, and to give him new credit and capacity." The force and applicability of these decisions will be more readily observed by a comparison of the section of the constitution of Oregon, above cited, with very similar provisions in the constitution and the laws of New York. In *Perkins v. Stevens* (24 Pickering, 277), it was in substance declared that a full pardon of an offense removes all blemishes of character, wiped away the infamy of the conviction, and restores the convict to his civil rights. Article II, section 2, of the constitution of the United States, provided that the president "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." The power vested in the president by this provision of the federal constitution, is perhaps more extensive than that vested in the governor of this state by the provision of the state constitution already cited; but both rest upon the same broad principle, and there are no good reasons why the general rules adhered to in one case, should not govern in the other. The principles and powers are much too analogous to justify the application of different rules. In *Ex parte Garland* (4 Wallace, 333-380), the supreme court of the United States,

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decided that "a pardon reaches the punishment prescribed for an offense, and the guilt of the offender, and where the pardon is full, it releases the punishment, and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense." If granted before conviction, it prevented any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights." Hence we conclude that the pardon granted to Meng, restored to him the privilege of an elector, and that in striking his vote from the number cast for appellants, the court below erred. Before leaving this branch of the case, we would state that in our opinion, article II, section 3 of the state constitution, does not in any way operate as a restriction or limitation upon the effect of a pardon granted by the executive, the force and effect of that section being confined to those convicted of infamous crimes, from whom the executive clemency has been or may be withheld.

C. H. Yates and W. S. Ford, two negroes, voted for the respondents. On behalf of the appellants, it is urged, that being negroes, they were disqualified from voting by article 1, section 2, of the state constitution, and the laws passed in pursuance thereof, which limit the privilege of the elective franchise to white persons. On the other hand, it is urged, that they became legal voters upon the ratification of the fifteenth amendment to the federal constitution, and that therefore their votes should be allowed to stand as cast. The gravity of the question presented by the conflict of the state and federal constitutions, cannot be over estimated, and for various reasons we are led to examine into it with a degree of care and circumspection commensurate with its importance. On March 30, 1870, the secretary of state of the United States by proclamation declared, in substance, that the fifteenth amendment to the constitution of the United States had been ratified by the legislatures of the states of North Carolina, West Virginia, Massachusetts,

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Wisconsin, Maine, Louisiana, Michigan, South Carolina, Pennsylvania, Arkansas, Connecticut, Florida, Illinois, Indiana, New York, New Hampshire, Nevada, Vermont, Virginia, Alabama, Missouri, Mississippi, Ohio, Iowa, Kansas, Minnesota, Rhode Island, Nebraska, Texas, and Georgia—in all, thirty states. It also appears from the said proclamation, that the state of New York, by its legislature, passed resolutions withdrawing the previous ratification. The power of a state thus to withdraw its previous ratification has been strenuously asserted and as strenuously denied. Upon the question, however, we do not pass, for even if the state of New York had the power so to do, the necessary number of states ratifying the said amendment still remains. It is conceded, that if the said amendment was legally ratified by the necessary number of states through their legislatures, and the proper returns made thereof to the department of state at the federal capital, then the secretary of state, acting in behalf of the president of the United States, had the power and authority, in the discharge of his official duty, to issue, or cause to be issued, such proclamation. The fact of his having issued it, basing his action, as he necessarily did, upon the official returns filed in the department over which he presides, carried with it *prima facie* evidence of the legal ratification of the said amendment. We cannot presume otherwise, than that he regularly performed his official duty, and that the resolutions of the legislatures of the states named, ratifying the amendment were in his custody, having been placed there officially. In the record and proofs of this case we find nothing overcoming this *prima facie* evidence or lessening the force of this presumption. The question of the legality of the ratification of this amendment is one which is exceedingly difficult of solution. If it is a political question, it can only be properly passed upon by the people or their representatives, and judicial inquiry is, from the very nature thereof, precluded. If judicial, then the courts have the power to inquire into and pass upon every step taken and every vote cast, in congress and in the legislatures, in

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every stage of the progress of the amendment, from the time it was first proposed in the congress of the United States, to the date of the issuing of the proclamation by the secretary of state. This would certainly open up a wider range of jurisdiction than has ever before been traversed by any state court, and whatever may be the powers of the federal courts in this direction, it must be conceded, we think, that no state court has the necessary power or jurisdiction to marshal before it, the proofs necessary to establish any disputed question of fact in connection with the passage and ratification of this amendment.

Let us assume, however, for the purposes of this case, that it is a judicial question. A careful examination of the records discloses nothing to warrant the court in pronouncing it illegal and void. It is true, counsel in the argument, alluded to certain facts of pretty general notoriety, which, if true and properly established, would undoubtedly weigh heavily against the validity of the amendment, but they were all extraneous to the record, and lacked those qualities necessary to command or justify judicial consideration. The manner of the adoption of this amendment is a matter of history, and while individuals may be constrained to believe it an unwise measure of government policy, and while the very peculiar circumstances attending its ratification by the legislatures of some of the states render it obnoxious to exception, yet in view of the ascertained facts in this case, we cannot do otherwise than declare it to be a valid amendment to the federal constitution. To hold otherwise under the circumstances would be to unwarrantably overthrow certain well established principles of law, and give to judicial discussion such a coloring of partisan feeling as would lead to very unfortunate results. We proceed next to consider the effect of this amendment upon article II., sec. 2, of the state constitution. Prior to the ratification of the said amendment the several states had complete control over all questions of suffrage, that being among the powers reserved by the tenth amendment to the federal constitution. By the ratification of the fifteenth amendment they in a measure parted

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with this reserved right, so far as to acquiesce in the removal of all restrictions heretofore existing "on account of color, or previous condition of servitude," and to agree not to abridge the right granted by that amendment, leaving negroes, who are recognized as citizens by certain acts of the federal congress, free to exercise the privileges of the elective franchise in any and all the states upon the same conditions as white persons. Having been ratified, this amendment became a part of the federal constitution—part of the supreme law of the land—and its effect is to deprive the provisions of the state constitution and the acts of the state legislature, restricting the exercise of the suffrage to white persons, of all legal force and efficacy. The votes of Yates and Ford will remain as cast, and as counted by the court below. In passing upon this case, the court below refused to allow the votes of seven persons, cast for appellants, and those of four other persons cast for the respondents; it having found that though otherwise qualified, they voted out of the several precincts in which it was claimed they resided. Article II, section 17, of the state constitution, declares that "all qualified electors shall vote in the election precinct in the county where they may reside for county officers, and in any county in the state for state officers, or in any county of a congressional district in which such elector may reside for members of congress." This provision appears to be the basis upon which rests section 1 of title I of chapter XIII, p. 695 of the general laws, which section provides, among other things, "that ninety days *bona fide* residence in a county, next preceding an election, shall be required to entitle a person to vote for county and precinct officers, and likewise ninety days preceding such election in a district for district officers." It clearly appears that a person who has resided in the state of Oregon for six months, and is otherwise qualified, may cast his vote for any candidate for any state office in any county in the state, also, that being a citizen of the state, and having resided in a certain district ninety days next preceding an election, he may vote for any candidate for any district office in any county in the district wherein he

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may be on the day of the election. Assuredly, then, the logical sequence would be, that, having resided in a certain county ninety days next preceding an election, the elector may vote for county officers in any part, or precinct rather, of the county. But it is not in view of the law proposed to lay down such a broad and comprehensive rule, the purpose of this inquiry being simply to ascertain and arrive at what should be the just and proper rule by which to decide the exact point presented.

It appears that the persons referred to, though they resided within the county, had no fixed and settled domicile in any precinct therein, but that from the nature of their avocations—being for the most part stock raisers, herders and transporters of freight—were constantly changing the locality of their temporary domiciles. There is no law upon the statute book which fairly reaches the circumstances of the persons whose right to vote is now being inquired into. General rules we have, and a number of legislative enactments, which, if we were to construe them narrowly, might be cited in opposition to their right to vote. But it is not our intention to place upon these laws an interpretation which, while it agrees with the letter, totally disregards the spirit thereof. Every qualified resident of a county has a right to cast his vote therein for county officers. As a matter of abstract justice, the mere fact of his being fixedly domiciled in some one of the precincts therein, should not invest him with greater rights than should be accorded to one who may chance to reside in a part of the county where no precinct has been erected, or to one whose employment obliges him to shift his domicile from point to point, with such frequency as to prevent him from acquiring the qualification of a residence of ninety days in any given precinct. All these classes are equally interested in the proper administration of the affairs of the county, as well as of the district or of the state, and should in all fairness be allowed a vote. It is true that when an individual has established for himself a settled residence and fixed domicile in any precinct of a county, there he must vote. When, however,

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an individual is a *bona fide* resident of a county, but has no fixed residence or domicile in any particular precinct therein, he may vote in any precinct in which he finds himself on the day of election. It may be that by allowing this class of persons to vote in whatever precinct they chance to be on the election days, may increase the facilities for the perpetration of fraud, and may induce reckless persons to repeat their votes, but if the laws punishing fraudulent voters are enforced as they should be, the danger to be apprehended is not so great as the wrong of unnecessarily and arbitrarily restricting the privileges of that large number of worthy and energetic citizens, who, from the nature of their honest employment, frequently have no fixed residence, and are constantly called upon to shift even their temporary abodes, from point to point, in order to properly conduct their business. Being well assured that our views upon this branch of the case agree with the spirit of the law, we shall allow these votes to remain as they stand upon the poll books.

Appellant's counsel charge error in the court below, in counting the votes of H. Crellish, E. Bernard, and E. A. Willis. These persons voted for the respondent, but it appears that their votes were excluded from the final count by the judges of election, in the manner prescribed by section 23, p. 702, of the general laws. From the statement of agreed facts, it appears that they were all persons of foreign birth, and that they had resided long enough in the state and county to be entitled to vote, if otherwise qualified. It also appears that they had been naturalized less than six months prior to the election, and having previously served in the armies of the United States, were admitted to citizenship in the manner set forth in section 171 of the act of congress, in relation to the naturalization of aliens. It is urged that, notwithstanding this section dispenses with any previous declarations of intentions, and permits the naturalization of an alien, under certain circumstances, to proceed without such previous declaration, still such person cannot exercise the privilege of an elector until one year has

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elapsed from the date of his naturalization. In support of this proposition, counsel cite article II, section 2, of the state constitution, and particularly that part thereof, which declares that "every white male of foreign birth of the age of twenty-one years and upwards, who shall have resided in the United States one year, and shall have resided in this State during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States one year preceding such election, * * * shall be entitled to vote, at all elections authorized by law," and insist that in cases such as these, this constitutional provision becomes a dead letter, unless we treat the naturalization of an alien under section seventeen of the act of congress referred to, as nothing more than a declaration of intention, and refuse him the privilege of voting until a full year has elapsed from the date of such naturalization. We confess our utter inability to discover any legal or logical force in the proposition presented. The question: Should these votes be counted? furnishes its own answer. When these persons were naturalized, they became citizens of the United States instantly, and as such had a right to vote, for it is agreed that they had resided in the state and county a much greater length of time than the law requires. The court below counted these votes, adding them to the number cast for respondent, and in so doing, did not err.

The next question of importance that presents itself, is as to the proper disposition of the costs herein. The court below having found in favor of the respondents, adjudged that they have and recover costs and disbursements. Was this judgment erroneous? We think it was, and for these reasons. All the authorities concur in declaring the right to recover costs to be purely statutory. No such right existed at common law. The authority to tax costs and disbursements *eo nomine* in favor of the prevailing party in the English courts, is found in the statute of Gloucester, 6 Edward I, c. 1, and in the statutes, 23 Henry VIII, c. 15; 4 James I, c. 3; 8 & 9 William III, c. 11; and 4 and 5 Anne,

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c. 16; and the various amendments thereto. In this state, the right to recover costs is given by the code; the provisions in relation thereto being in principle and effect similar to the English statutes named. The rule above set forth is clearly laid down in *Clark v. Dewey* (15 Johnson, 250); in *Waterman v. Benschotten* (113 Johnson, 425), and in *The Supervisors of Onondaga v. Briggs* (3 Denio, 174), and is fully recognized and followed in *McDonald v. Evans*, recently decided by this court. Upon this point, see *Bouvier's Dictionary*, vol. 1, title, costs, subdivision 2, and the authorities there cited. These principles of law being settled clearly and beyond all contention, let us apply them to this case. Title V of chapter 13 of the general laws, provides for and points out the manner of contesting the election of district, county, and precinct officers. It is singularly silent upon the subject of costs and disbursements. Title V, of chapter 6 of the code of civil procedure, is devoted entirely to the subject of costs and disbursements, and sections 539 and 541 enumerate or describe the cases in which the plaintiff or defendant is allowed to recover costs. Neither of the sections contain any reference to a case of contest of election. It is evidently a *casus omissus*. Section 543 of the code, provides that "a party entitled to costs, shall also be allowed for all necessary disbursements," etc.

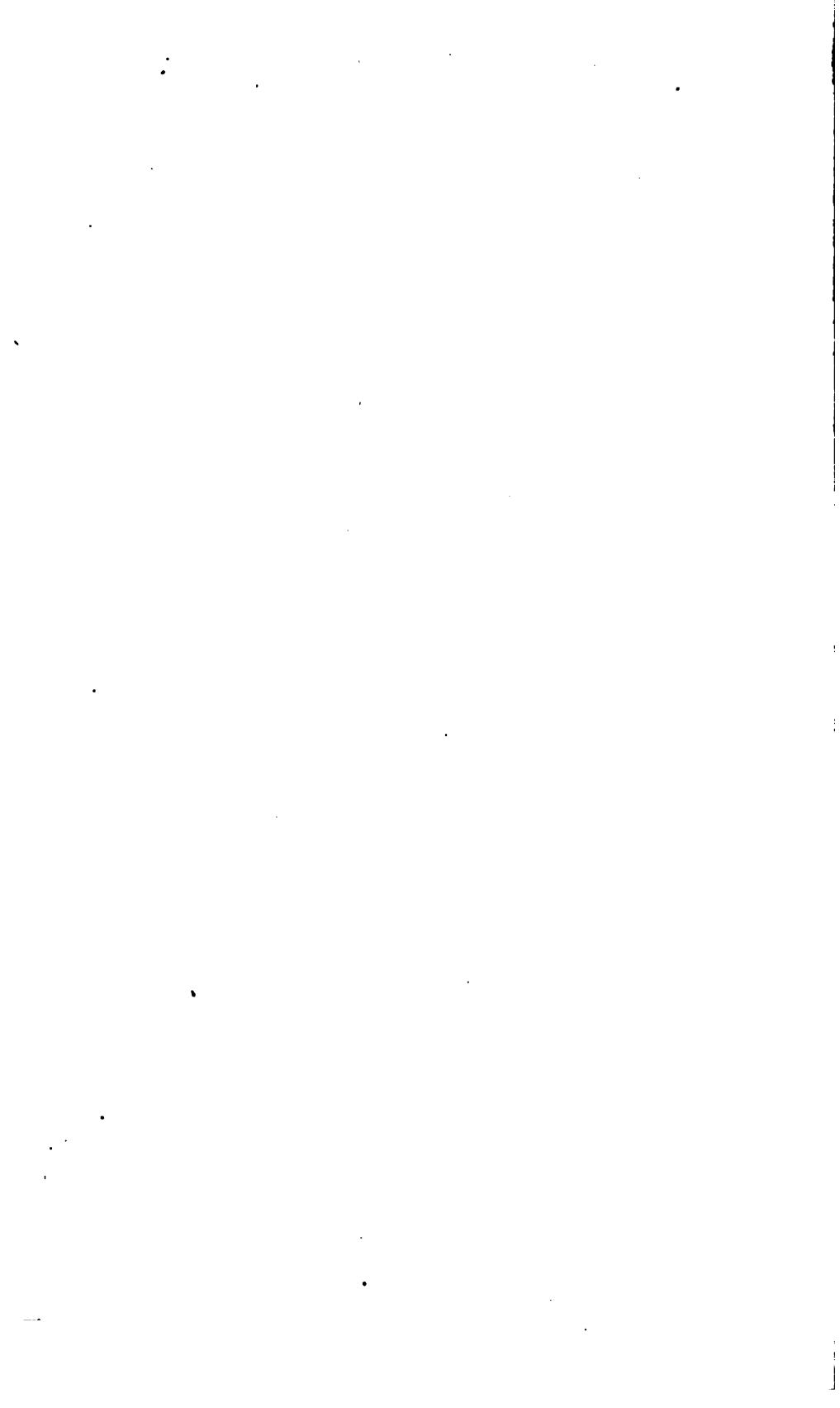
From the application of the rules of construction just referred to, it follows, that unless a party is allowed costs he cannot recover disbursements. For the recovery of disbursements is made dependent upon the recovery of costs by the statute. It follows, therefore, that in cases of contest of election, under title V, of chapter 13 of the general laws, costs and disbursements cannot be recovered, and the court below erred in entering a judgment therefor.

As regards the votes of the other persons named in the brief, and referred to in the argument, we find that they were disposed of on questions of fact solely, and upon examination, we have concluded not to interfere with the findings of the court below in relation thereto.

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From the above, it follows, that to the number of votes polled for Wood and Mays, as ascertained by the court below, there should be added the votes of Zettler, Snooks, Brown and Curry; and to the number of votes polled for Fitzgerald and Wingate, should be added the votes of Henderson, Kimberlin, Masterson, Scroggins, Manning, Williams, Strau and Meng. The number of legal votes, therefore, for each candidate stands as follows: Wood, 315; Fitzgerald, 309; Mays, 307 and Wingate, 306. Wood and Fitzgerald having each a majority over the other candidates, are entitled to the offices of commissioners of Wasco County.

Let judgment be entered and certificates issued accordingly.



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See RECEIPT; CONSIDERATION.

CONFESSION.

See *APPEAL*, 4.

1. **ADMISSIONS.**—Where admissions were made to the arresting officer, and it also appears that the officer advised the defendant to make a confession but it did not appear whether the admission was made before or after the advice was given, and the defendant's attorney neglected to question the witness on that subject, the Court refused to charge the jury that they should disregard the evidence of the admissions. *State v. Leonard*, 157.

CONFESSION OF JUDGMENT.

See *JUDGMENT*; *CLOUD ON TITLE*, 1.

1. **UNDER** a statute relating to judgments by confession, which requires the plaintiff to file a sworn statement, and enacts that the clerk shall indorse the judgment upon the statement and enter it in the judgment book, the two entries ought to be deemed to have the force of duplicate copies, each having the effect of an original. *King v. Higgins*, 406.
2. **CLERICAL ERROR.**—Where the clerk indorsed the judgment on the statement, but by mistake omitted to enter it in the judgment book, it was held that the omission would not invalidate the judgment, except in favor of one who has been misled by the omission. *Id.*

CONSIDERATION.

1. **THE** release of a doubtful claim is a sufficient consideration to uphold a counter-release of a claim for damages. *Williams v. Poppleton*, 139.
2. **PAROL** evidence may explain a writing as to the consideration expressed therein, and the actual consideration may be proved. *Id.*
3. **FAILURE** of consideration may be pleaded in an action for unpaid assessments on stock. *Oregon Central R. R. Co. v. Scoggins*, 161.

CONSTITUTION.

See *COUNTY SEAT*, 1; *CORPORATION*, 21, 32; *STATUTE*, 1; *VACANCY*, 1.

1. **IF** the question, whether a woman who died before the passage of the donation law became entitled under that Act, is still open to discussion, its review should be had in the Supreme Court. *White v. Allen*, 103.
2. **LEGISLATIVE POWER.**—Except in special cases, where the constitution prohibits it, the Legislature may control the unearned emoluments of office. *Bird v. County of Wasco*, 282.
3. **THE** object of art. 4, sec. 20, of the Constitution, is to prevent matters wholly foreign, and disconnected from the subject expressed in the title of the Act, from being inserted in the body of the Act. *Simpson v. Bailey*, 515.

CONTINUANCE.

See *ATTORNEY*, 1.

1. **WHERE** it was not satisfactorily shown that there was a reasonable expectation of procuring the evidence at another term, a continuance was denied. *State v. Leonard*, 157.

2. *IDEM*.—Where the witness has no fixed residence, a clear showing should be made of the circumstances tending to prove the probability of obtaining his evidence. *Id*.

CONSTRUCTION.

See CONSTITUTION, 3; COVENANT, 1; FEES, 4; POWER, 2; CORPORATION, 27, 28; JUDGMENT LIEN, 2; PLEADING, 23, 24.

1. CONTRACT.—Where an estimate had been previously made, and the defendant contracted for removing earth, in the words, "For grading as per estimate on file, thirty cents per cubic yard:" *Held*, that *prima facie* the estimate must be taken as correct, and the burden of proof is on the plaintiff to show that there is a mistake in the estimate. *Northrup v. City of Portland*, 361.
2. WHERE a literal construction of the words of an act leads to an absurdity, resort will be had to the ordinary means of interpretation, and the court will look to the occasion and necessity of the law, the defects in the former law, and the designed remedy. *Smith v. Smith*, 363.
3. IN construing contracts, meaning must be given to each of the terms employed if possible. *Chapman v. Wilbur*, 326.

CONTRACT.

See ALTERATION, 3; EVIDENCE, 20; INTERLINEATION, 1; CONSTRUCTION, 1; COIN, 4; IMPLIED PROMISE, 1; PARTY WALL, 2; PLEADING, 12, 13, 20, 21; STATUTE OF FRAUDS, 4; REDEMPTION, 5.

1. ALTERATION.—Where one of two joint makers had altered a promissory note before it was accepted by the plaintiff, if the plaintiff was without fault and was deceived, and received the note believing that the note was altered by both the makers, when in fact one of the makers did not authorize the alteration, the plaintiff is entitled to recover against the latter upon the original note, to the same extent as if no alteration had been made. *Wills v. Wilson*, 308.
2. ALTERATION.—Adding to a promissory note the words "in gold coin," is a material alteration. *Id*.
3. SUCH an alteration by one of the makers, without authority from the other, would be an unlawful act. *Id*.
4. NOTICE.—If the plaintiff took the note knowing that it was altered without the consent of one of the makers, he cannot recover against the maker not consenting. *Id*.
5. *IDEM*.—If the note was so altered, and the plaintiff before receiving the altered note was put upon inquiry, he cannot recover against the party who did not consent to the alteration. *Id*.
6. CONSTRUCTION.—A grant by the words, "To flow back the water to the foot of the present wheel," * * * * * "and the right at all times to use all the water which naturally flows below said mill:" *Held*, to mean the water as it flows from the mill-wheel, the mill being in operation. *Oregon Iron Company v. Trullenger*, 1.

7. **IDEM.**—It is necessary to give consideration to all parts of a deed in order to ascertain what was the intention of the parties; and for this purpose, surrounding circumstances within the knowledge of the parties at the time should be considered. *Id.*
8. **WHERE S. has a contract with K., the owner of a ferry, that S. and his family shall have their ferryage free; and S. owns land on which there is a saw-mill and growing timber, and contracts with N. that N. shall use the saw-mill and saw the growing timber at N.'s expense and cost; and S. shall convey the lumber from the mill across the ferry and sell it, and the two shall divide the gross proceeds equally; and S. hires G. to haul the lumber across the river at the ferry for \$3 per thousand—the ferryage of the lumber across the river is not the ferryage of S., and K. is not obliged to ferry the lumber free of charge.** *Stephens v. Knott*, 50.
9. **CONDITIONAL AGREEMENT.**—The parties having entered into an express agreement, to be liable in a certain contingency, no agreement to assume other similar liabilities can be implied. The specification of a particular contingency, excludes all ideas of liability upon a different contingency. *Failing et al. v. Osborne*, 498.
10. **COVENANT OF WARRANTY.**—The plaintiffs stipulated on the sale of land to refund the purchase money, "if it should be adjudged that they had no legal right to sell, and if said defendant by reason thereof, be legally compelled to give up possession of said premises:" *Held*, that the defendant had no greater right under this contract, than one who takes under a covenant of general warranty. That there must be an ouster, either actual or constructive, before a cause of action arises. *Id.*
11. **SEVERABLE CONTRACTS.**—A contract to sell a farm, a town lot, and certain personal property for a gross sum, is not a severable contract. *Banks v. Cross*, 477.

CONVERSION.

See LARCENY.

CONVEYANCE.

See HUSBAND AND WIFE, 1.

1. **TRUSTEE.**—Where one in possession, without title, conveyed two adjacent blocks of land in trust, "for the purpose of erecting an academy thereon and therewith," with covenants for further assurance, and having afterwards acquired the legal title, executed a deed purporting to be confirmatory of the former deed, and purporting to recite its substance, but which describes the former deed as a deed conveying the "land for the purpose of establishing thereon a seminary of learning to be divided into a male and female academy;" and which in terms grants the land in trust, "for the uses and purposes aforesaid:" *Held*, that the change in language does not denote an agreement on the part of the *cestuis que trust* to change the nature of the trust. *Chapman v. Wilbur*, 326.

CORPORATION.

See EQUITY, 1; PLEADING, 18; PRACTICE, 1, 5; TITLE, 1; JUDGMENT, 4; POWER, 1, 2; PRINCIPAL AND AGENT, 1; TRIAL, 1, 2.

1. **INTEREST OF DIRECTOR.**—The statute contemplates that directors of a private corporation will sometimes act on matters where the director has an interest. *Hedges v. Paquet*, 77.
2. **IDEM.**—The rule that prohibits one from being judge in his own cause, applies so far to directors, that the decision of the interested director, in his own behalf, is not conclusive, but it is subject to be set aside if it is not equal and just, and free from any taint of fraud or partiality. *Id.*
3. **DIRECTORS, VOIDABLE ACTS OF.**—Acts of a Board of Directors, even if voidable on the ground of interest of members in the question, are not for that cause absolutely void, and whoever seeks to avoid them, at his own instance and suit, must show that he is injured in consequence of the act complained of. *Id.*
4. **PRACTICE.**—In an action to condemn lands to the use of a railroad company, when the issue is formed by a statement in the complaint that the defendant's damages do not exceed the sum of two hundred dollars, and a statement in the answer that the land sought to be appropriated is of the value of \$234, and that the additional damages to the defendant resulting from such appropriation will amount to \$2,516, the defendant was permitted to open and close the case. *Oregon & Cal. R. R. Co. v. Barlow et al.*, 311.
5. **ESTIMATE OF VALUE.**—The amount to be paid for the land appropriated should be its value at the commencement of the action. *Id.*
6. So held although the road was constructed before the commencement of the action. *Id.*
7. **WHERE the road was constructed before the commencement of the action,** the defendants were not allowed to recover in this proceeding for trees destroyed on the land appropriated before the action was commenced, nor for timber cut down by the plaintiff on the defendants' adjacent lands. *Id.*
8. **DANGER FROM FIRE.**—If a railroad is to be constructed so near to the defendants' barns as to improperly expose them to danger from fire from passing trains, that is a proper subject to be considered by the jury in estimating damages. *Id.*
9. **IDEM.**—If the danger is such as to render it advisable to remove the barns, the cost of removal is a proper subject to be considered by the jury in estimating damages. *Id.*
10. **PONDING WATER.**—If, by an improper construction of the railroad now built, the road bed acts as a dam and improperly ponds water and causes it to overflow the defendants' lands, their remedy is by a proceeding to prevent or remove the obstruction, and it is not a ground for additional damages in this proceeding. *Id.*
11. **IDEM.**—The damages to be assessed are such as result from a proper construction of the road. *Id.*
12. **IDEM.**—If a proper construction of the road will pond water upon the defendants' adjacent land, the overflow is a proper subject to be considered in estimating damages. *Id.*

13. **DISABILITY.**—A corporator may sue his corporation. *Miller et al. v. Oregon City Paper Mf. Co.*, 24.
14. **IDEM.**—A director of a private corporation is not individually bound by the vote of a majority, when he claims on a contract in which he is one party and the corporation another. *Id.*
15. **ACTION BY A CORPORATION FOR RIGHT OF WAY.**—In an action by a corporation to condemn land for a canal, the plaintiff cannot disparage the defendant's title. *Willamet Falls Canal and Lock Co. v. Kelly*, 99.
16. **PARTIES.**—It being the duty of the plaintiff to bring all owners into Court, if he does not, he cannot avail himself of the neglect in order to reduce the amount of damages. *Id.*
17. **COMPENSATION.**—The defendants are entitled, in any event, to the actual value of the parcel sought to be condemned to the plaintiff's use. But whether the defendants recover in addition to that, depends upon whether the injury done to the residue will be greater than the benefits. *Id.*
18. **WATER POWER.**—If the appropriation will carry with it water power, or render such power less valuable, such water power should be considered by the jury in making the estimate. *Id.*
19. **ARTICLES OF INCORPORATION.**—The evidence of the powers of a corporation is now to be found in the general law and in its articles of incorporation, as formerly this was contained in the charter. *Oregon Cascades R. R. Co. v. Bailey and The Oregon Steam Nav. Co.*, 164.
20. **CONDEMNATION OF PRIVATE PROPERTY.**—The law permits private property to be appropriated for the use of a corporation, whether acquired by purchase or by the judgment of a court. *Id.*
21. **THE CONDEMNATION IS TO A PUBLIC USE.**—When private property is condemned to the use of a corporation, it is condemned to a public use. *Id.*
22. **IDEM.**—It is because the corporation is to be a public agent that the legislature has power to authorize the condemnation. *Id.*
23. **IDEM.**—If the government authorizes the taking of private property for any use but a public one, the act is void. *Id.*
24. **PURCHASE.**—A corporation has no higher or better right to property condemned by the judgment of a court, than to that acquired by purchase without condemnation. *Id.*
25. **LIABILITY OF CORPORATION'S PROPERTY TO CONDEMNATION.**—In general, property held by a corporation and necessary to the public use for which the corporation is created, is not liable to be condemned and appropriated to another corporation for the same use. *Id.*
26. **A GREATER public necessity may arise and thus authorize a new appropriation; as, for instance, where it is necessary for one railway to cross another.** *Id.*
27. **ARTICLES OF INCORPORATION, CONSTRUCTION OF.**—A company incorporated to transport freight and passengers on a river and its portages, is not necessarily limited to one side of the river at a portage. *Id.*

28. **RIGHT OF WAY.**—A railway corporation has no right to the exclusive control of a route or way that is not necessary and useful in its corporate business. *Id.*
29. **ABANDONMENT.**—If a railway corporation has voluntarily abandoned its right of way, the land is liable to be condemned to the use of another corporation. *Id.*
30. **FORFEITURE.**—The question of forfeiture cannot be tried in a proceeding to condemn land.
31. **ORGANIZATION.**—A corporation may receive subscriptions of its stock, and may sue before being fully organized. *Id.*
32. **THE word corporation is used in the constitution to denote such ideal bodies as had previously been created under that name by charter or by special legislative acts.** *Oregon Cascade R. R. Co. v. Bailey et al.*, 164.
33. **ACTION TO CONDEMN LAND FOR A RAILROAD.**—Where the plaintiff sues to condemn sixty feet in width, he will not be allowed to give evidence of the value, and ask a verdict for the condemnation of forty-five feet in width. *Id.*
34. **A CORPORATION CONFINED TO SPECIFIED BUSINESS.**—A corporation organized for the purpose of "manufacturing and selling lumber," cannot hold a lien for labor performed in the construction of a building. Where such a corporation sued to enforce a lien for both lumber furnished and labor performed in the construction of a building, and the complaint failed to show how much of the gross amount was for lumber furnished, the judgment was reversed. *Dalles Lumber and M. Co. v. Wasco W. M. Co. et al.*, 527.

COSTS.

See DIVORCE, 1.

1. **THE pleadings show a charge and a denial of wrongful entry upon premises in order to remove a house, a claim and denial that the house was built upon lands to which at that time the parties were conflicting claimants under the homestead law:** *Held*, that these allegations put the question of title directly in issue, and under sec. 531, subdivision 1, of the Code, would give costs to the plaintiff, though he recovered less than fifty dollars by the judgment. *Crossman v. Lander*, 495.
2. **If the house was not real property, the defendant should have made such a case in his pleading.** *Id.*
3. **BILL of disbursements, how constituted, nature of objections thereto.** *Wilson v. City of Salem*, 482.
4. **COSTS can in no action at law be awarded to both parties.** *McDonald v. Evans*, 474.
5. **CONSTRUCTION of sec. 539 of the Code, as to when a party is entitled to costs.** *Id.*
6. **COST ON APPEAL.**—Where, on appeal from a justice's court, the respondent obtains a verdict for less than he recovered in the justice's court, the costs on appeal are in the discretion of the court. *Hollister v. Hagui*, 319.

7. **COSTS.**—In cases of contest of election under title V, of chapter 13 of the General Laws, costs and disbursements cannot be recovered. *Wood v. Fitzgerald*, 568.

CO-TENANT.

See **EJECTMENT**, 2.

COUNTY.

See **HIGHWAY**, 2.

COUNTER CLAIM.

See **ANSWER**.

COUNTY COURT.

See **TAXES**, 4, 5; **PROBATE**, 1, 2.

COUNTY JUDGE.

1. **TERM OF OFFICE.**—Whenever a county judge is elected his term of office continues for four years, unless terminated by death or resignation. *Whitney v. Johns*, 533.

COUNTY SEAT.

See **MILEAGE**, 1.

1. **CONSTITUTION.**—*Held*, that the act of the legislature changing the location of the county seat of Umatilla county, is constitutional; and that the proceedings of the county officers in pursuance of that act are valid. *Simpson et al. v. Bailey et al.*, 515.

COVENANT.

See **ANSWER**, 1; **WARRANTY**, 1; **CONTRACT**, 10.

1. **CONSTRUCTION.**—A covenant in a deed was in these words: "The said party of the first part, for them and their heirs, the said premises, in the quiet and peaceful possession of the said party of the second part, their heirs and assigns, against the said party of the first part and their heirs, lawfully claiming, or to claim the same, shall and will warrant, and by these presents forever defend:" *Held*, not to be a covenant for quiet enjoyment, and that it does not warrant against assigns of the grantor. *Moffitt et al. v. Coffin*, 426.
2. **IDEM.**—An express covenant cannot be construed so as to extend its obligations by implication. *Id.*

COVERTURE.

See **HUSBAND AND WIFE**.

CRIMINAL LAW.

See **HOMICIDE**; **LIQUOR SPIRITUOUS**, 1; **EVIDENCE**, 4, 5, 6, 7, 16, 17; **WRIT OF REVIEW**, 6; **SELF DEFENSE**, 1, 2.

1. **APPEAL.**—On appeal in a criminal case the transcript contained no specification or assignment of error, and the appeal was dismissed. *State v. Ellis*, 497.
2. **SELLING LIQUOR WITHOUT LICENSE.—TIME.**—On an indictment for selling liquor without a license, where there is no question as to the statute of limitations, the time when the liquor was sold is not material. But where the name of the person to whom the sale was made is stated in the indictment, the proof must show that a sale was made to the person named. *State v. Cutting*, 260.

DAMAGES.

See CORPORATION, 5; HIGHWAY, 4; PRINCIPAL AND AGENT, 1, 2; SPECIAL DAMAGE, 1; CONTRACT, 10; EVIDENCE, 12; NEGLIGENCE, 3, 6; RAILWAY, 1, 10.

1. In an action for malpractice, either the plaintiff is entitled to recover full compensation for the injury, or the defendants are entitled to be wholly exonerated. *Heath v. Glisan et al.*, 64; *Giltner v. Boydston*, 118.
2. **MEASURE OF DAMAGES.**—In estimating damages for injury to the person carelessly shot and hit by the wad of a cannon, it is proper to consider loss of time, money necessarily expended, or debts necessarily incurred in curing the bodily injury, and whatever bodily pain the injury may have caused the injured party. *Oliver v. North Pacific Trans. Co.*, 84.

DECREE.

See APPEAL, 3; JUDGMENT, 12; PARTNERSHIP, 6; PRACTICE, 16; FORECLOSURE, 3; PLEADING, 16.

1. **BILL OF REVIEW.**—A defective decree, which is fully presented in the pleadings, may be reformed under a prayer for general relief. *Allen v. White*, 103.
2. **JUNIOR MORTGAGEE.**—A junior mortgagee is not so far bound by a decree rendered without notice to him, as to be compelled to apply by bill for leave to redeem. But he may resort to the ordinary mode of foreclosure as if no sale had been made. *Besser v. Hawthorne*, 129.
3. **JURISDICTION OF THE PERSON.**—If the rule formerly bound the party not served, to abide "by the account," unless he could show fraud or collusion, it does not show that his right to redeem was cut off. *Id.*
4. **SETTING ASIDE A DECREE.**—As a general rule, a decree of a Court having jurisdiction cannot be attacked collaterally, and it is not a sufficient showing of a want of jurisdiction to allege that the defendant was insane at the time of the trial. *Harper v. Harding*, 361.
5. **PRESUMPTION OF JURISDICTION.**—Every reasonable intendment will be invoked in support of the judgment or decree of a court of general jurisdiction. *Grosilouts v. Northcut*, 394.
6. **DECREE, WHEN VOID.**—After a decree has become final, any colorable statement of facts in the complaint is sufficient to prevent the decree from being held void, but there must be some statements sufficiently general to comprehend the requisite facts by fair intendment. *Id.*

7. If there is nothing in the facts stated in the pleadings that would, if denied, render proofs necessary, no intendment in favor of the decision will arise to aid or supply an omission of essential facts. *Id.*

DEDICATION.

1. **STREETS.**—When the owners of land lay it off into blocks and streets and sell lots abutting on a street so laid off, so that the street is a convenience to the purchasers of the lots, those acts amount to a dedication of such street. *City of Portland v. Whittle*, 126.
2. **DEDICATION BINDS PURCHASERS.**—Such persons, and all persons subsequently claiming under them, are bound. *Id.*
3. **NOT REVOCABLE.**—When the land is dedicated by the owners and becomes a street, the subsequent assent of such owners, that it should be used as a public square, would not change its character from that of a street. *Id.*

DEED.

See CONVEYANCE, 1; EVIDENCE, 2, 3; EQUITY, 2; HUSBAND AND WIFE, 1.

DEFAMATION.

See SLANDER.

DEFAULT.

See JUDGMENT, 9; PRACTICE, 16.

DEFENSE.

See ANSWER; PLEADING; EQUITY, 3; SLANDER, 2.

DELAY.

See AMENDMENT, 1.

DELIVERY.

See POSSESSION.

DEMURRER.

See PLEADING.

1. The objection "that the complaint does not state facts sufficient to constitute a cause of action," is not waived by failure to demur. *Bowen et al. v. Emmerson*, 452.

DEPOSITION.

See EVIDENCE, 10; TESTIMONY DE BENE ESSE, 1.

DESCENT.

See HEIR.

DILIGENCE.

See AMENDMENT, 1.

DISCRETION.

See COSTS, 6; TRIAL, 2.

1. VARIANCE.—In an action on an undertaking on attachment, one allegation was, that the plaintiff had actually contracted a sale of the grain attached; and the evidence rejected was, that the owner of the grain had a conditional promise, that upon a certain contingency buyers would take the grain, and that that contingency afterwards happened: *Held*, without deciding whether the rejected evidence made out a ground for special damage or not, that there was a variance which the court in its discretion, might disregard: *Held*, also, that if it was discretionary to admit or reject the evidence, nothing short of an abuse of discretion could be assigned as error. *Brown v. Moore*, 435.
2. In all matters of discretion the general doctrine is, that nothing but an abuse of discretion by the court below, will warrant the interference of an appellate court. *Pittman v. Pittman*, 553.

DISSOLUTION.

See PARTNERSHIP, 6.

DIVORCE.

1. HUSBAND TO ADVANCE MONEY.—Where a decree of divorce, obtained without personal service of summons was opened and the wife allowed to defend, and there were circumstances tending to show that the plaintiff had induced or permitted his wife to go to another state that he might obtain a divorce in her absence without her knowledge; it was directed that an order be entered requiring the plaintiff to provide for the expenses of her return; but it was required that the order should contain provisions guarding against diverting the money to any other purpose. *Smith v. Smith*, 363.
2. POWER OF THE COURT.—Whether, under the act of 1854 concerning divorce, the court had power to transfer, in fee, the lands of a party to the children. (*Query*.) *GrosLouis v. Northcut*, 394.
3. CUSTODY OF INFANTS.—The law confers upon the court which pronounces the decree of divorce, the power to make such order for the care and custody of the infants as shall best subserve their interests. *Pittman v. Pittman*, 553.
4. PRESUMPTION.—The mere fact of awarding the care and custody of the infants to the party in fault, raises no presumption of error. *Id*.

DOCKET.

See JUDGMENT LIEN, 2.

DOMICIL.

See RESIDENCE.

DONATION ACT.

See POSSESSION 2; TREATY, 1.

1. DECEASED WIFE.—Where a husband and wife settled upon 640 acres of land in 1844, and the family continued to reside upon and cultivate the land,

but the wife died on the twenty-sixth day of September, 1850; no land was granted to the wife by the donation act, and the survivor can take under that act but 320 acres. *White v. Allen*, 103.

2. **PRIVITY.**—One who has no right to or interest in the land cannot set up the disqualification of a donee. *Id.*
3. **IDEM.**—One who settled on government land, in compliance with the donation act, while it was still government land and before a certificate issued to another, acquired such an interest as rendered him competent to set up the disqualification. *Id.*
4. **SUPREME COURT.**—If the question whether a woman who died before September 27, 1850, or her representatives, become entitled under the donation act is still open to discussion, since the ruling in *Ford v. Kennedy*, 1 Oregon, 166, its review should be had in the Supreme Court. *Id.*
5. **DONATION LAW.—JUDICIAL SALE.**—A claimant under the donation law, may, before patent issues, obtain such an interest in the land as will be subject to judicial sale. *Groslovius v. Northcut*, 394.
6. **HEIRS OF SETTLERS.**—The heirs of those settlers who died prior to September 27, 1850, cannot, under the donation act, inherit by virtue of the residence and cultivation of their ancestors. *Newton v. Spencer*, 548.

DURESS.

See EVIDENCE, 22.

EASEMENT.

See RIGHT OF WAY.

EJECTMENT.

1. **TITLE.**—In an action for the recovery of the possession of real property, it is not necessary for the plaintiff to set out his muniments of title. *Pease v. Hannah*, 301.
2. **WHERE** a defendant set up a title in himself to an undivided interest, he was required to specify what interest or share he owns. *Id.*

ELECTION.

JUDGMENT, 6; RESIDENCE, 2; NATURALIZATION, 1; SPECIAL PROCEEDINGS, 1, 2, 3, 4.

1. **CHALLENGE.—PROOFS.**—Judges of election have no right to reject votes without any evidence that they are illegal, the voter not being challenged, or having taken the prescribed oath. If they desire other proofs beyond the voter's sworn statement, the evidence must be produced at the time he votes. *Darragh v. Bird*, 229; see *Wood v. Fitzgerald*, 568.
2. **WILL OF MAJORITY.**—In a contest, the will of a majority of the legal voters, as expressed by their votes, must be carried into effect. *Id.*
3. **REJECTED VOTES.**—All rejected votes should appear on the poll book in the manner prescribed in sec. 18, p. 701, of the compiled laws. *Id.*

4. **PRECINCT.**—An elector should vote for county officers only in the precinct where he resides. *Id.*
5. **BURDEN OF PROOF.**—A party attacking a voter who has voted, must show that he is disqualified. *Id.*
6. **CHALLENGE.**—Whenever a person is challenged by a legal voter, unless such challenge is withdrawn, he has no right, unsworn, to vote, nor can the judges receive such vote. *Id.*
7. **CLOSING POLLS.**—After the hour for closing the polls, they cannot be opened again. *Id.*
8. **IN CONTESTED ELECTION CASES** the law limits judicial inquiry to the votes returned upon the poll books. *Wood v. Fitzgerald*, 568.
9. **RESIDENCE.—PRECINCT.**—Where an individual has established for himself a settled residence and a fixed domicile in any precinct in a county, there he must vote; where, however, an individual is a *bona fide* resident of a county, but has no fixed residence or domicile in any particular precinct therein, he may vote in any precinct in which he may find himself on the day of election. *Id.*
10. **NATURALIZATION.**—By being naturalized an alien becomes instantly a citizen of the United States, and of this state, and as such has a right to vote for county officers at any election, at which such officers are to be chosen, occurring after his naturalization, if he has the necessary qualification as to residence in the state and county. *Id.*

EQUITY.

See **CORPORATION**, 3; **MERGER**, 2; **REDEMPTION**, 2, 3; **JURISDICTION**, 1; **PARTNERSHIP**, 4, 6.

1. **CORPORATION.**—A court will not interfere to review or correct the proceedings of the directors of a corporation, on the ground of fraud or mismanagement, unless there is cause for a displacement of the officers, or for a final winding up of the affairs of the corporation. *Hedges et al. v. Paquett et al.*, 77.
2. **VOIDABLE DEED.**—An application to set aside a voidable deed, is addressed to the equity side of the court, and a grantor who seeks to show that his own deed is voidable, has no standing in a court of equity while he retains the purchase price. *Kelly v. People Trans. Co.*, 189.
3. **EQUITABLE DEFENSE.**—It is essential to an equitable defense that the defendant has no legal defense. *White v. Allen*, 103.
4. **BILL OF REVIEW.**—By our code, § 377, whatever subject matter could formerly have been presented by any of the various formal bills in chancery, may now be brought before the court as an "original suit;" and if the subject matter constitutes a defense, it may now be presented by an answer. *Id.*
5. **AFFIRMATIVE RELIEF.—DEFENSE.**—It is not always the case that facts which would constitute a perfect defense, will afford grounds for affirmative equitable relief. *Kennard et al. v. Sax*, 263.

6. **ERROR THAT DOES NOT PREJUDICE.**—Where a judgment has been irregularly entered without fraud, but the case shows that the amount is justly due from the party complaining, and that payment is withheld, equity will not relieve. *Id.*
7. **INCREASE IN VALUE.**—Where no attempt is made to pay the purchase price, and obtain a deed until a considerable change has occurred in the value, and the defendant has made improvements, this has been held a sufficient ground for refusing to decree specific performance. *Knott v. Stephens*, 269.

ERROR.

See **APPEAL**, 8; **DISCRETION**, 1, 2; **COMMITMENT**, 1; **VERDICT**, 1, 3.

ESTOPPEL.

- See **REDEMPTION**; **EVIDENCE**; **HOMICIDE**, 1, 2, 3, 4; **NEW TRIAL**, 14; **PRACTICE**, 8; **RECEIPT**, 1, 2; **TESTIMONY DE BENE ESSE**, 1; **CONSIDERATION**, 2; **CONFESSION**, 1; **LICENSE**, 1; **PATENT**, 1; **PRINCIPAL AND AGENT**, 3; **SLANDER**, 1.
1. **PRESUMPTION.**—If a note is found in the possession of the maker it raises a presumption that the note has been paid. *Hedges v. Strong, Admr.*, 18.
 2. **CONSIDERATION.**—An acknowledgment of payment of purchase money contained in a deed or bill of sale may be explained by parol. *Brown v. Cahalin*, 45.
 3. **PAROL** evidence is admissible to show that the consideration expressed in a deed was not the actual consideration. *Id.*
 4. **REASONABLE** doubt defined. *State v. Connally*, 69.
 5. **BURDEN OF PROOF.**—When the prosecution has established beyond a reasonable doubt that the defendant has killed the person slain, by means of purposely shooting him with a gun, the burden of proof is thrown on the defendant to prove any facts that may tend to justify or excuse the killing. *Id.*
 6. **IDEM.**—In that case, if the evidence of the prosecution does not show facts or circumstances tending to justify or excuse the act, the burden of proof being thrown upon the defendant, the rule in regard to reasonable doubt does not apply to justification or excuse; but the defendant must show by a preponderance of evidence that the killing was justifiable or excusable. *Id.*
 7. **PREPONDERANCE.**—The question whether the killing was necessary in order to prevent a felony, is to be determined by the preponderance of evidence. *Id.*
 8. **REASONABLE DOUBT.**—Yet, if the jury, upon the consideration of the whole of the evidence, entertain a reasonable doubt as to whether shooting the deceased was unlawful, they must give the prisoner the benefit of that doubt, and acquit him. *Id.*
 9. **EXPERTS.**—Opinions of men skilled in a particular art or science are admitted to aid the judgment of the jurors. *Heath v. Glisan et al.*, 64.

10. If it is error for a witness to voluntarily state the contents of a written memorandum, the error will not vitiate the residue of his deposition if he at the time produce and exhibit the memorandum. *White v. Allen*, 103.
11. MEMORANDUM.—The fact that a witness has looked at a memorandum to refresh his recollection before being called, does not render him incompetent. *Id.*
12. EXPERT.—The opinion of a witness was not permitted, of the value of a parcel of land, "including whatever water privilege would be appurtenant." *Willamet Falls Lock and Canal Co. v. Kelly*, 99.
13. MEASURE OF VALUE.—It is not competent to show what a parcel of land brought at a sheriff's sale for the purpose of proving its value. *Id.*
14. BURDEN OF PROOF.—AGENT MUST DISCLOSE AGENCY—If the defendant pleads that he made the contract as agent of another, and not as principal, and issue is joined, it devolves on the defendant to show that he so contracted, and that the plaintiff had notice of the agency. *McCall v. Elliot*, 138.
15. REPUTATION.—The defendant, in an action for malpractice, should not be allowed to prove what is his *reputation* for skill in his profession, but the witness may state facts within his knowledge as to the defendant's skill. *Williams v. Poppleton*, 139.
16. OPINION.—Nor is the opinion of another physician to be taken as to whether the defendant is a skillful surgeon. *Id.*
17. CONFESSIONS.—Where the conversations of the defendants are admissible as confessions, the whole conversation relating to the subject may be admitted, although it includes a conversation that occurred on a former occasion, which was being detailed to the defendant. *State v. Taylor*, 10.
18. PRIVILEGE OF WITNESS.—A witness on a former examination had made statements which were then reduced to writing; she was asked whether on that occasion she mentioned the name of one "Morris." It was not error for the Court to direct that the witness be allowed to inspect the writing before answering, although it appears on inspection that the name "Morris" was not contained in the writing. *Id.*
19. PAROL evidence of a written statement of value furnished the assessor is not admissible. *The O. Cascades R. R. Co. v. The O. Steam Nav. Co. et al.*, 164.
20. ADMISSIONS.—Nor is the assessment roll admissible to prove the value of the land sought to be condemned for a railway, or to prove at what sum the owner valued it. *Id.*
21. In an action for work and labor, if the defendant seeks to show that the plaintiff did not labor diligently, he should raise the question by his answer. *Albee v. Albee*, 321.
22. EXPERT—OPINION.—A medical expert was not permitted to give his opinion in regard to the skill of the defendant, but was allowed to state how (with what degree of skill) the defendant performed a certain surgical operation. *Boydston v. Giltner*, 118.

23. **ADMISSIONS.**—Where admissions were made to the arresting officer, and it also appears that the officer advised the defendant to make a confession, but it did not appear whether the admission was made before or after the advice was given, and the defendant's attorney neglected to question the witness on that subject, the Court refused to charge the jury that they should disregard the evidence of the admissions. *State v. Leonard*, 157.

EXAMINATION.

See **WRIT OF REVIEW**, 6; **HABEAS CORPUS**, 3, 4, 5.

EXCEPTIONS.

See **PRACTICE**.

EXCISE.

See **LICENSE**.

EXECUTION.

See **DONATION ACT**, 5; **FORECLOSURE**, 6; **JUDGMENT LIEN**, 1; **PATENT**, 5; **REDEMPTION**, 1.

1. **EXEMPTION.**—Property cannot be recovered as exempt from execution "unless selected and reserved by the judgment debtor, or his agent," at the time of the levy, or within a reasonable time after the levy shall be known to him. *White v. Thompson et al.*, 115.
2. **IDEM.**—When the constable was about to levy on wheat, and the defendant asked him to levy on the defendant's team, in place of the wheat, claiming no exemption, the levy is good. *Id.*
3. **REDEMPTION.**—The equity of redemption cannot be cut off, unless by the intervention of a court or by an actual conveyance by the mortgagor. *Besser v. Hawthorn et al.*, 129.
4. **THERE** is a distinction between a voluntary payment by a garnishee and compulsory payment on execution. *Opitz v. Winn*, 9.
5. In the former case, the court refused to interfere, on motion of the defendant, although the money was due for labor, and claimed to be exempt from execution. *Id.*
6. **GARNISHEE.**—A. recovered judgment in this court against D. in a civil action for a sum of money, and thereupon, in a proceeding in which V. was served with garnishee process, A. recovered a judgment against V. for an indebtedness alleged to be due from V. to D. In pursuance of the judgment against D. the latter was imprisoned for want of payment. An execution was issued against V., and V. paid to the sheriff the amount adjudged against him, under protest, and then appealed his case to the Supreme Court. *It was held*, that the money paid by V. must be applied on the execution against D., notwithstanding the protest and appeal. *Dufurnoy v. Stitzel*, 58.

EXECUTOR AND ADMINISTRATOR.

See PATENT, 3.

1. WHERE one of two co-executors resides in this State, and transacts the business pertaining to the estate, and the other resides abroad, the residence of the former will determine the *situs* of the *choses in action* belonging to the estate. *Johnson et al. v. The City Council of Oregon City*, 13.

EXPERTS.

See EVIDENCE, 11.

1. TECHNICAL WORDS.—The opinion of an expert may be taken upon the meaning of technical words used in a pleading, but not on the construction of the pleading. *Williams v. Poppleton*, 139.
2. EXPERT.—OPINION.—A medical expert was not permitted to give his opinion in regard to the skill of the defendant. *Boydston v. Giltner*, 118.
3. BUT an expert was allowed to state how (with what degree of skill) the defendant performed a certain surgical operation. *Id.*

EXPRESS CONTRACT.

See CONTRACT, 9.

FACTS.

See TRIAL; PLEADINGS, 20, 21.

FALSE IMPRISONMENT.

See HABEUS CORPUS.

FEES.

See USURY, 1.

1. MILEAGE.—Construction given to secs. 14, p. 738; 15, p. 739; 33, p. 903; and 35, p. 905, with reference to fees and constructive mileage. *Howe v. Douglas County*, 488.
2. SINGLE mileage for each precinct, only allowed for serving notices upon the judges of election. *Id.*
3. WHAT mileage allowed in serving the panel of jurors with notices. *Id.*
4. FEES OF OFFICERS.—The act of the legislature approved October 21, 1864, in relation to the fees and compensation of officers, in the counties lying east of the Cascade range of mountains, is an original, independent act, and not merely an amendment to a pre-existing law. *Bird v. County of Wasco*, 282.

FELONY.

See PARDON, 1.

FEMME COVERT.

See HUSBAND AND WIFE.

FENCE.

See RAILWAY, 9.

FERRY.

1. LICENSE.—Under the law of 1854, sec. 40, p. 868, a ferry license becomes a limited franchise. *Beckley v. Learn*, 470.
2. At the expiration of any term of license, the owner of the lands, embracing the ferry landings might assert his right to a preference to the grant of license, with the same effect as he might have done at the time of the establishment of the ferry. *Id.*
3. UNDER the statute in relation to ferry license, no person other than the owner of the land can secure a license, unless the owner of the land neglects to apply; and then only upon proof of service of notice. The same rule governs a case where the application is for the renewal of a license. *Beckley v. Learn*, 544.

FORECLOSURE.

See DECREE, 2; LIEN, 1, 2, 3; MECHANIC'S LIEN, 1, 5.

1. WANT OF SERVICE.—Where S. conveyed land to A. and took back a mortgage for the purchase money, which was duly recorded, and A. mortgaged the same land to B., and the latter mortgage was also duly recorded. And afterwards S. foreclosed his mortgage without making B. a party to the suit of foreclosure, and S. purchased the premises under the decree of foreclosure, and regularly obtained his sheriff's deed under the decree, and then sold and conveyed to H. The title of H. is subject to the mortgage executed by A. to B. *Besser v. Hawthorne*, 129.
2. PARTIES ON FORECLOSURE.—When the statute is silent as to the necessity of making a junior mortgagee a party, the rule applies, that all incumbrancers, as well as the mortgagor, should be made parties, if not as indispensable, at least as proper parties to the suit, whether they are prior or subsequent incumbrancers. *Id.*
3. IF any incumbrancers, whether prior or subsequent, are not made parties, the decree of foreclosure does not bind them. *Id.*
4. EQUITY of redemption defined. *Id.*
5. TITLE.—Our system has so changed the law, that the mortgagor retains the right of possession and the legal title, and the title cannot be divested by a suit to which the mortgagee is a stranger. *Id.*
6. REDEMPTION.—The statute defining the mode of redemption does not create the equity of redemption. It only defines the modes in which that right is to be exercised. *Id.*

FORFEITURE.

See ABANDONMENT, 1.

1. THE question whether a corporation has forfeited its franchises can not be tried in an action brought to obtain a right of way. *Oregon Cascades R. R. Co. v. Oregon Steam Nav. Co.*, 164.

2. **USURPATION.**—If a corporation has usurped privileges or franchises not belonging to it, to the detriment of the public, the remedy is by an action in the name of the state. *Kelly v. Peo. Trans. Co.*, 189.

FORMER ADJUDICATION.

See **PLEADING**; **BILL OF REVIEW**, 1, 2.

FRANCHISE.

See **FORFEITURE**, 1, 2; **FERRY**, 1.

GARNISHEE.

See **EXECUTION**, 6.

1. **GARNISHEE.**—Where a person who is served with garnishee process voluntarily pays money to a constable, it is not error for the justice of the peace to refuse to enter an order directing the constable to pay the money to the judgment debtor, although the money may be earnings for which the justice could not lawfully enter judgment. *Opitz v. Winn*, 9.

GUARANTY.

See **CONTRACT**, 9.

HABEAS CORPUS.

See **COMMITMENT**, 3, 4.

1. **PROCESS.**—Informality in the commitment will not justify a discharge when it is in the power of the petitioner to produce the record and he fails to produce it. *Fleming v. Bills*, 286.
2. A **CERTIFIED** copy of the proceedings, voluntarily and irregularly presented, does not give jurisdiction to review and remand the cause. *Id.*
3. **CERTIORARI.**—A writ of review was issued as auxiliary to the writ of *habeas corpus*. *Id.*
4. **HABEAS CORPUS.**—On *habeas corpus* to discharge from an order holding to bail, a rehearing of the evidence is not a matter of course. *Id.*
5. **CERTIORARI AS AUXILIARY TO HABEAS CORPUS.**—A writ of review as auxiliary to the writ of *habeas corpus* being granted, the court refused to rehear the witnesses who were examined before the committing magistrate. *Id.*
6. **THE JURISDICTION** of a committing magistrate may be put in issue on the return of a writ of *habeas corpus*. *Norman v. Zieber, Sheriff*, 197.

HEIR.

See **DONATION ACT**, 6; **PARTNERSHIP**, 3; **PATENT**, 4, 5, 6.

HIGHWAY.

See **NAVIGABLE STREAM**, 9, 10.

1. **COUNTY LIABLE FOR NEGLIGENCE OF ROAD SUPERVISORS.**—Road supervisors are agents for the county, and the county is liable for a super-

visor's negligence in not repairing a bridge. *McCalla v. Multnomah County*, 424.

2. **BRIDGE.**—The county is responsible, under section 347 of the Code, for negligence in allowing a bridge to be out of repair, whereby injury accrues to any person traveling over it, who is himself not guilty of negligence; and negligence is a question for the jury. *Id.*
3. **DONATION LAW.**—The heirs of those settlers who died prior to Sept. 27, 1850, cannot, under the Donation Act, inherit by virtue of the residence and cultivation of their ancestors. *Newton v. Spencer*, 548.

HOMICIDE.

See EVIDENCE, 4, 5, 6.

1. **MALICE.**—Where the proof shows that the killing was done voluntarily, or intentionally with a weapon which was intended for taking life, the use of that kind of a weapon raises a presumption that the killing was done maliciously. *State v. Bertrand*, 61.
2. **BURDEN OF PROOF.**—When such proof is made, unless the circumstances of the killing show that it was justifiable or excusable, the burden of proof devolves on the defendant to show an excuse or justification for the killing. *Id.*
3. **WHEN** killing with such weapon is positively proved, or proved beyond a reasonable doubt, it is not a ground of acquittal that the evidence fails to show whether or not the killing was justifiable. *Id.*
4. **THE** burden of proof, in such a case, rests on the defendant to show by a preponderance of evidence that the killing was justifiable or excusable. *Id.*

HUSBAND AND WIFE.

1. A *femme covert* derives her power to convey real estate from the statute, and a full compliance with the statute includes the specified acts on the part of the certifying officer. *Harty v. Ladd*, 353.
2. **THE** acknowledgment by a married woman, of the execution of her deed, cannot be proved by parol in a case where the certificate has never existed. *Id.*

IGNORANCE.

1. **IGNORANCE** of the law will not excuse. *Wills v. Wilson et al.*, 308.

IMPLIED PROMISE.

1. **PARENT AND CHILD.**—Where a father gives his minor son the privilege of working for himself and having whatever wages he may earn, and afterwards the minor voluntarily returns and labors on his father's farm until he becomes twenty-one years of age, the law does not imply a promise on the part of the father to pay wages to the son for the time during the minority. *Albee v. Albee*, 321.

IMPRISONMENT.

See HABEAS CORPUS; EXECUTION, 6.

IMPROVEMENTS.

See REDEMPTION, 5.

INDICTMENT. •

1. DEGREE OF CRIME.—A defendant charged with stealing from the person, may be convicted either of larceny, or of larceny from the person, if the facts charged in the indictment are sufficient to include both degrees of crime. *State v. Taylor*, 10.

INFANCY.

See IMPLIED PROMISE, 1; DIVORCE, 3.

INJUNCTION.

1. DISCRETION.—Although the removal of a pilaster was deemed the only adequate remedy, a temporary injunction before final hearing was refused, on the grounds that the plaintiff showed no indications of presently occupying the premises, and the building had so far progressed that a removal would be nearly or quite as expensive at the present time as at the completion of the building. *Burton v. Moffitt et al.*, 29.
2. GRANTING or refusing an injunction is deemed the exercise of the discretion of the court. *Id.*
3. COMPENSATION.—When, by not conforming to the terms of a building contract, the width of a plaintiff's premises above the upper floor was improperly diminished by two inches, the injunction was denied on the ground that the injury is not beyond pecuniary compensation. *Id.*
4. WHERE a motion for an injunction is submitted on complaint and answer, and the answer denies all the equities of the bill, the injunction should not be granted. *Wellman v. Harker et al.*, 253.

INTEREST.

1. INTEREST.—A note, made before the passage of the statute prescribing rates of interest, which calls for three per cent. per month, will be enforced according to the terms of the note. *Besser v. Hawthorne*, 129.
2. USURIOUS CONTRACT.—An agreement made under the statute of 1854, to compound interest oftener than once a year, cannot be enforced; *but held*, that it does not vitiate the contract as to the principal sum secured and simple interest. *Murray v. Oliver*, 539.

INTERLINEATION.

See ALTERATION, 1.

1. ALTERATION.—Adding to a promissory note the word "in gold coin," is a material alteration. *Wills v. Wilson et al.*, 308.

ISSUE.

See TRIAL, 2.

JOINDER OF ACTIONS.

See ABATEMENT, 1; PRACTICE, 13; ANSWER, 2; PLEADING, 22.

JUDGMENT.

See ABATEMENT, 1; DECREE, 5, 6, 7; GARNISHMENT, 1; PRACTICE, 5; RECORD, 1; CONFESSION OF JUDGMENT, 1, 2; EQUITY, 4; PLEADING, 2; RAILWAY, 7.

1. CONFESSION OF JUDGMENT.—Where a confession of judgment is made, "in an action pending," the statement mentioned in section 252 of the Code is not requisite. *Miller v. The Oregon City Mfg. Co.*, 24.
2. CORPORATION.—The president of a private corporation is competent to confess judgment. *Id.*
3. ALTHOUGH a junior judgment creditor may be relieved on motion from the effect of a judgment irregularly entered, it is not clear that a charge of actual fraud in procuring a confession of judgment ought to be tried on motion and affidavits. *Id.*
4. THE Court refused to set aside a judgment obtained by confession in favor of a director and against his corporation. *Id.*
5. CERTAINTY.—When a judgment is rendered, the record should show unequivocally what matters have been adjudicated. *Dray v. Crick*, 298.
6. CERTIFICATE OF ELECTION.—The certificate of a board of canvassers of election returns is the record of what was decided, and it is the legitimate evidence of the decision. *Warner v. Myers*, 218.
7. CONCLUSIVENESS.—When a tribunal or board, no matter how inferior its jurisdiction or limited its power, proceeds within its jurisdiction, and determines a matter which it is authorized by law to decide, its decision, even if erroneous, is binding until it is reversed. *Id.*
8. APPEAL.—ITS EFFECT ON THE DECISION.—The fact that an appeal has been taken does not affect the conclusive nature of the decision while it remains unreversed. *Id.*
9. ENTRY OF JUDGMENT BY THE CLERK.—In cases falling within the provisions of sec. 246 of the Code, the clerk has power to enter judgments upon defaults, without judicial direction or intervention. *Graydon v. Thomas*, 250.
10. IDEM.—In so doing, he exercises ministerial and not judicial functions. *Id.*
11. IDEM.—INFORMALITIES.—Judgments when so entered, will not be opened up, set aside, or disregarded because of slight informalities. *Id.*
12. SATISFYING JUDGMENT.—Ordinarily a court has power to direct a decree or judgment, which is of record before it, to be canceled of record, upon a proper showing that it is in fact satisfied. *Provost v. Millard*, 370.

JUDGMENT LIEN.

1. LIEN OF JUDGMENT.—A transcript of a judgment in a justice's court, was filed in circuit court, in 1861, and became a lien on real estate for five

years, under the law of 1855. In 1862, the statute made it a lien as long as an execution might issue, repealing the law of 1855, and in 1864 it was enacted that a lien should extend to ten years, and process was provided by which execution might issue after ten years, which would continue the lien. Section 3 of the repealing act, p. 944 of the Code, passed 1864, provides that "no rights vested or liabilities incurred at that time shall be lost or discharged : " *Held*, under these statutes, that the judgment lien is an incident to a judgment, and is a "liability incurred," and was saved from the effect of a repealing statute. *Dearborn v. Patton et al.*, 420.

2. **PARTNERSHIP.**—Effect of docketing a judgment in the partnership name. *Id.*

JUDGES OF ELECTION.

See **ELECTION**, 1; **JUDGMENT**, 6.

JUDICIAL SALE.

See **EXECUTION**; **DECREE**.

JURISDICTION.

See **APPEAL**, 5; **CORPORATION**, 2, 23; **DIVORCE**, 2; **JUDGMENT**, 10, 12; **PRACTICE**, 9, 22; **PROCESS**, 1; **REGISTER OF LANDS**, 2; **TAXES**, 4; **COMMITMENT**, 1, 4; **DECREE**, 3, 5; **DOCKET**, 1; **HIGHWAY**, 1; **PLEADING**, 2, 16, 17; **PROBATE**, 1; **SPECIAL PROCEEDINGS**, 3; **WRIT OF REVIEW**, 2.

1. **THE** circuit court refused to entertain a bill to compel a plaintiff who had obtained a decree of foreclosure in another district, to appear there and cancel the decree. *Provost v. Millard*, 370.
2. **REGULAR PROCESS PROTECTS AN OFFICER.**—An attachment issued on an insufficient affidavit will protect the officer who served it, but not the party and justice of the peace who caused it to issue. *Id.*
3. **JUSTICE'S DOCKET ENTRIES.**—When a judgment is attacked collaterally, a court will not look outside the record to learn that the appointment of a special constable was not properly made. *Id.*
4. **EFFECT OF APPEARING.**—When a docket entry shows that the defendant appeared, and does not show that the appearance was special, parol evidence will not be heard to attack the judgment collaterally. *Id.*
5. **SUBJECT MATTER.**—Although a complaint be objectionable on the ground that it does not state facts sufficient to constitute a cause of action, the court may have jurisdiction, and may permit amendment. *Norman v. Zieber, Sheriff*, 197.

JURORS.

See **HIGHWAY**, 2; **NAVIGABLE STREAM**, 1, 3; **NEW TRIAL**, 15; **VIEW**, 1; **VERDICT**, 2.

1. **JURORS** are not at liberty to disregard the law, under a belief that they can thus do justice between the parties. *Davis v. Mason*, 154.
2. **OPINIONS** of experts are admitted in evidence to aid and not to control the judgment of the jurors. *Heath v. Glisan et al.*, 64.

3. A JUROR's affidavit cannot be received to show a mistake in making up the verdict. *The Oregon Cascades R. R. Co. v. Oregon Steam Nav. Co.*, 178.

JUSTICE OF THE PEACE.

See DOCKET, 1; JURISDICTION, 1, 3.

LAND.

See DITCH, 1; REGISTER OF LANDS, 1; RAILWAY, 1.

LANDLORD AND TENANT.

1. REPAIRS.—A tenant has no remedy against a landlord for suffering premises to be out of repair, unless the landlord has agreed to repair. *Kahn v. Love*, 206.

LARCENY.

See INDICTMENT, 1.

LEGAL TENDER.

See TENDER; COIN.

LEGISLATURE.

See CONSTITUTION, 2; STATUTE, 1; CORPORATION, 22.

LEVY.

See EXECUTION.

LICENSE.

See FERRY, 2; LIQUOR, SPIRITUOUS, 1.

1. BURDEN OF PROOF.—The burden is on the defendant, to show that he is licensed. *State v. Cutting*, 260.
2. PAYMENT.—If one sells liquor, it is not material whether it is paid for, but it would not be a violation of the statute for one to give away liquor without any expectation of gain or compensation. *Id.*
3. SUBTERFUGE.—But if there is an understanding, express or implied, that the party who obtains the liquor will pay for it, or will purchase something else because of it, the act is disposing of the liquor within the meaning of the statute. *Id.*

LIMITATION.

See ACTION; JUDGMENT LIEN, 1.

LIENS.

See MECHANICS' LIEN, 5; FORECLOSURE, 1.

1. PRIORITY.—On a foreclosure of a junior mortgage, the proceeds will be applied; first, to satisfy the prior mortgage; second, the junior mortgage; and the residue to the holder of the legal title. *Besser v. Hawthorne*, 129.

2. WHEN the holder of a senior mortgage purchased premises under a decree of foreclosure, and acquired the legal title, the equity which he previously held, would, by strict rules of law, be deemed merged in the legal title. *Id.*
3. BUT it has long been the practice in courts of equity to hold the legal and equitable title distinct, although both were vested in the same person, when it can be clearly gathered from all the proceedings that such was the intention of the holder when he acquired the legal title. And whenever the nature of the case shows that such severance of the legal and equitable title is evidently to the interest of the holder, such intention will be presumed. - *Id.*

LIQUOR, SPIRITUOUS.

See LICENSE, 1, 2.

1. WHERE one disposes of liquor without a license, in less quantities than one quart, if there is an understanding, express or implied, that the party who obtains the liquor will pay for it, or will purchase something else because of it, the act is disposing of the liquor within the meaning of the statute. *State v. Cutting*, 260.

LOTTERY.

1. A lottery is a game of hazard in which small sums are ventured for the chance of obtaining greater. *Fleming v. Bills, Sheriff*, 286.
2. Payment of prizes in money is not essential to constitute a lottery. *Id.*

MACHINERY.

See NEGLIGENCE, 6.

MALPRACTICE.

See DAMAGES, 1; EXPERT, 2; VERDICT, 2; EVIDENCE, 14; PLEADING, 11, 14.

1. LIABILITY OF A SURGEON.—A physician or surgeon is only responsible for ordinary care and skill, and for the exercise of his best judgment in matters of doubt. The words ordinary care and skill are here used in their common acceptation. *Heath v. Glison et al.*, 64.
2. ORDINARY SKILL.—By ordinary skill is meant such skill as is commonly possessed by men engaged in the same profession. *Id.*
3. SURGEON NOT LIABLE FOR ERROR IN JUDGMENT.—If the defendants possessed ordinary skill and used ordinary care, they are not liable for an error in judgment committed in a case presenting grounds for doubt or uncertainty. *Id.*
4. If the surgeon is grossly ignorant, or fails to use ordinary care in the treatment of a case he has in charge, it is just he should suffer the consequence of his acts. *Williams v. Poppleton*, 139.
5. JUDGMENT OF SURGEON.—When a skillful and careful surgeon exercises his best judgment in a case of doubt, he cannot be held responsible for a want of success. *Id.*

6. **RES GESTA.**—A consultation held on occasion of the alleged improper treatment, is to be treated as a part of the *res gesta*, and may be given in evidence. *Id.*
7. **SYSTEMS OF PRACTICE.**—If the treatment is in accordance with a recognized system of surgery, it is not for the court or jury to undertake to determine whether that system is the best, nor to decide questions of surgical science upon which surgeons differ among themselves. *Id.*
8. It is sufficient if the practitioner follow a known and recognized system. *Id.*
9. **SURGEON, DISCRETION OF.**—If a surgeon purposely refracture a broken arm without informing the patient of the nature of the operation, it does not follow from that fact alone that he was guilty of bad surgery. *Boydston v. Giltner*, 118.
10. **GROSS IGNORANCE.**—But if the arm was refractured by the defendant because of gross ignorance or the want of ordinary care or skill, that act of itself renders the defendant liable. *Id.*

MANDAMUS.

1. **MANDAMUS** lies to compel an officer to perform an act which the law specially enjoins as a duty resulting from his office. *Ball v. Lappius*, 55.
2. An ordinance passed in 1862, directing the city marshal of the city of Portland "to procure at the cost of the city" * * * * "a small-pox hospital, the selection to be subject to the approval of the committee on health and police," does not impose such an official duty on the present city marshal as will be enforced by mandamus. *Id.*
3. **LEGAL RIGHT.**—Mandamus is proper only where a party has a legal right, and there is no other appropriate legal remedy. The right must be certain, and clearly made out by the facts of the case. *Id.*
4. **DISCRETION.**—The granting or refusal of the writ is discretionary. *Id.*
5. **MANDAMUS** cannot be used as a means to determine ultimate right to an office. *Warner v. Myers*, 218.
6. **COMMON LAW.**—The office of a writ of mandamus was the same at common law as it is now declared by the code. *Id.*
7. **PLEADING.**—An answer denying the legality of the election of the petitioner to an office which he holds will not abate the writ. *Id.*
8. The petitioner having plead the decision of the canvassers in his favor, and that he was in possession of the office, an answer declaring that a majority of the legal votes were cast for the defendant, was struck out on motion. *Id.*
9. An answer declaring that a contest was pending to determine the legality of the election, was also struck out. *Id.*
10. Where the clerk has money in his hands applicable to the payment of a warrant, which upon presentation he refuses to pay, the proper remedy is by mandamus. *Howard v. Bamford*, 565.

MANSLAUGHTER.

See HOMICIDE.

MARRIED WOMAN.

1. JUDGMENT.—Where a judgment is rendered against a married woman upon a contract made during coverture, in order to charge the separate property of a married woman, the record should show that the debt was contracted for the benefit of the separate estate, or for her own benefit on the credit of the separate estate. *Kennard et al. v. Saz*, 263.
2. PLEADING.—In an action against the wife alone, coverture at the time of making the contract may be plead in bar. *Id.*
3. WHEN the objection does not go to the liability, but the fact is merely that the party has married since making the contract, the marriage is pleadable in abatement. *Id.*

MECHANICS' LIEN.

1. FORECLOSURE.—Material-men must commence proceedings to foreclose their liens within a year from the date of filing their lien notices. *Coggan v. Reeves*, 275.
2. IDEM.—They must commence by filing a complaint. *Id.*
3. IDEM.—The fact of a lien-holder being made a party defendant by a plaintiff, because his lien is subsequent to the one sought to be foreclosed, does not release him from the duty of strictly pursuing his statutory remedy. *Id.*
4. PLEADING.—In a proceeding to enforce a mechanics' lien under the statute, the complaint should show that the contract was made with an owner or his agent. *Wilcox v. Keith*, 372.
5. BUILDING.—The defendants occupied several buildings as a woolen factory, on some of which the material was furnished and the labor performed; the mechanics' lien does not extend to all the buildings, but is confined to the building for which the material was furnished or on which the work was done. *Dalles Lumber and Mfg. Co. v. Wasco Woolen Mfg. Co.*, 527.
6. PLEADING.—It should appear by the complaint that notice of the lien was filed in pursuance of the statute. *Id.*
7. PRIORITY.—On a foreclosure of a junior mortgage, the proceeds will be applied; first, to satisfy the prior mortgage; second, the junior mortgage; and the residue to the holder of the legal title. *Besser v. Hawthorne*, 129.

MILEAGE.

See FEES, 1.

1. No mileage allowed for posting notices for collection of taxes. *Howe v. Douglas County*, 488.

MONEY.

See PAYMENT; COIN; TENDER.

MORTGAGE.

See FORECLOSURE, 1; LIEN, 1, 2, 3.

MURDER.

See HOMICIDE.

NATURALIZATION.

1. ONE who has obtained his final citizen papers, becomes a voter at the time of being naturalized. *Darragh v. Bird*, 229.

NAVIGABLE STREAM.

See PLEADING, 24, 25.

1. EXTENDING a boom temporarily across a navigable channel being a necessary act, what was a reasonable time for removing it, is a question for the jury. *Weiss v. Smith*, 446.
2. TRESPASS.—If there was no necessity for fastening a boom to plaintiff's land, the act would be a trespass—necessity was a question for the jury. *Id.*
3. THE riparian owner has an absolute right to enjoy his lands in all proper ways—the other party has an absolute right, as one of the public, to navigate the stream—neither can justly deprive the other of his rights. *Id.*
4. A STREAM, generally useful for floating boats, rafts or logs, though it be private property and not strictly navigable, is subject to the public use as a passage way. *Id.*
5. BOOMS.—How far such stream may be obstructed by use, or by booms. *Id.*
6. RIPARIAN RIGHTS.—The right to meddle with or touch upon the banks of such a stream, is founded upon necessity. *Id.*
7. THE common law rule, making the "ebb and flow of the tide the test of navigability" is not now applicable in the United States. *Id.*
8. If a stream is capable in its natural condition of being profitably used for any kind of navigation, its use to that extent is subjected to the general rules of law relating to navigation. *Id.*
9. How far the principles and rules pertaining to the navigation of tide waters and large streams, are to be applied to fresh water streams above the flow and ebb of the tide. *Id.*
10. ANY stream, on whose waters logs and timber can be floated to market, is navigable, and is a public highway for that purpose. *Felger v. Robinson*, 455. ✓
11. IDEM.—It is not necessary that the stream should be so available during the whole year to constitute it a navigable stream. *Id.*

NEGLIGENCE.

See HIGHWAY, 4,

1. WHERE an occupant of a building sues the owner for damages for an injury to the plaintiff's person, caused by the unsafe condition of the building, he must show that the unsafe condition of the building is not the fault of the plaintiff. *Kahn v. Love*, 206.

2. A STATEMENT in the complaint in general terms that the plaintiff exercised due care and caution at the time of the accident is not sufficient. *Id.*
3. CONTRIBUTORY NEGLIGENCE.—A plaintiff who sues for damages for negligence, must not himself be guilty of any fault that contributed to the injury. *Dufer v. Cully*, 377.

NEW TRIAL.

See JUDGE, 3.

1. WHERE it is evident that the jury have disregarded instructions, to the detriment of a party, it is ground for a new trial. *Brown v. Cahalan*, 45.
2. THE court is not at liberty to grant a new trial upon doubtful and disputed questions of fact that have been passed upon by a jury. *Lander v. Miles*, 40.
3. NEWLY-DISCOVERED EVIDENCE.—Motions for new trial on the ground of newly-discovered evidence are regarded with distrust, and the strictest showing of diligence and of all other facts necessary, is required. *Id.*
4. THE testimony must have been discovered since the former trial. *Id.*
5. It must be shown that it could not have been obtained with reasonable diligence on the former trial. *Id.*
6. THE evidence must not be cumulative. *Id.*
7. CUMULATIVE evidence is additional evidence to support the same point, and which is of the same character as evidence already produced. *Id.*
8. AFFIDAVIT OF WITNESS.—It is a practice that seems to be generally approved, to require the affidavit of the moving party to be accompanied by the affidavit of the witness, or that the omission be accounted for. *Id.*
9. CUMULATIVE.—Evidence of material facts which the moving party did not prove, nor attempt to prove, may be regarded as not cumulative. *Id.*
10. DILIGENCE.—A party who moves for a new trial should be free from laches, in not having moved for a continuance. *Id.*
11. It is not sufficient that the affiant depose in terms "that he has made diligent inquiry;" the affidavit should state facts. The question of diligence must be determined by a consideration of specific facts deposed to. *Id.*
12. ACCEPTING JUROR.—Where both parties voluntarily accept a juror who declares that he has formed a decided opinion on the merits of the case, the party asking to set aside the verdict for insufficiency of evidence, should present a clear case. *Williams v. Poppleton*, 139.
13. CONFLICTING EVIDENCE.—Where there was some evidence tending to show the damages to be the amount found, the court refused to set aside the verdict and grant a new trial. *Id.*
14. PREPONDERANCE OF EVIDENCE.—A verdict that is subject to no other objection, should not be set aside because the Judge differs from the jury, as to the preponderance of evidence. *Oregon Cascades R. R. Co. v. Oregon Steam Nav. Co.*, 178.

15. **JUROR'S AFFIDAVIT.**—It would be of dangerous tendency to set aside a verdict, on the ground that the juror has, after the trial, a different conception of the law, or of the facts, from that under which the verdict was rendered. *Id.*

NOTICE.

See **ALTERATION**, 1, 2, 3; **ANIMALS**, 1; **APPEAL**, 1; **ASSIGNMENT**, 1; **HIGHWAY**, 3; **PROBATE**, 3; **TESTIMONY DE BENE ESSE**, 1.

OFFICE.

See **VACANCY**, 1.

1. **TERM.**—The term of an office attaches to the person of the individual elected to fill the same. *State v. Johns*, 533.

OFFICER.

See **ATTORNEY**, 1; **FEES**, 4; **RESIDENCE**, 1; **CONSTITUTION**, 2; **REGISTER OF LANDS**, 1.

OWNERSHIP.

See **POSSESSION**; **TAXES**, 1, 2, 3.

PARDON.

1. A **PARDON** does not restore to a person convicted of felony the rights of an elector. *Darragh v. Bird*, 229.
2. A **GENERAL**, absolute pardon, relieves the person to whom it is granted, not only from imprisonment, but from all the consequential disabilities of the judgment of conviction, and restores such person to the full enjoyment of his civil rights. *Wood v. Fitzgerald*, 568.
3. **ARTICLE II**, section 3, of the State Constitution, does not operate as a restriction or limitation upon the effect of a pardon. *Id.*

PARTNERSHIP.

See **JUDGMENT LIEN**, 3.

1. **JOINDER OF REPRESENTATIVE OF DECEASED PARTNER.**—Where two persons, who were partners in the business of fishing and selling fish, bargained for a block of land, gave their note to the defendant for the price, took the defendant's bond for a deed on payment of the note and paid one year's interest before the note fell due, and one of the partners having died, the other claiming to act as surviving partner assigned the bond and the land to the plaintiff two years after the note fell due, no administration being had, and it being a disputed question whether the land was purchased for partnership purposes, specific performance was not decreed. *Knott v. Stephens*, 269.
2. In a suit by the assignee for specific performance, it was held that the question of fact whether the land was purchased for partnership purposes could not be ultimately settled, so as to bind the heirs of the deceased partner, in a suit where neither the heirs or the representatives of the deceased partner were made parties. *Id.*

3. **SPECIFIC PERFORMANCE.—CERTAINTY.**—If the representatives were parties, the question of fact might be determined in this suit, and all risk of that question removed by the decree. *Id.*
4. **FAIR dealing** does not require the defendant to convey to the assignee of the survivor, unless he had reasonable grounds of certainty on that question. *Id.*
5. **PARTIES.**—A partnership firm does not have the power to sue and be sued; that power is in the individuals that compose the firm. *Kamm v. Harker et al.*, 203.
6. **DISSOLUTION.—ACCOUNTING.**—If a partner being without fault, can show that his adversary has violated the term of the partnership contract, and abused the trust with which, as a partner, he was clothed, and that he has partnership assets which he has not accounted for, this entitles such partner to an accounting. In pleading it is only necessary for a party, whether plaintiff or defendant, to state the facts that constitute his cause of action or his defense. *Holladay et al. v. Elliott et al.*, 340.

PART OWNER.See **PARTNERSHIP**, 1.**PARTY WALL.**

1. **THE OWNERS** of a party wall, built at joint expense, are not tenants in common, but each owns his own land with a right to use the wall which right may enforce by action. *Burton v. Moffit et al.*, 29.
2. **ENCROACHMENT.**—Where a party contracted to build a wall sixteen inches or two bricks thick, on the division line, and to permit the other party to use the wall upon his paying one half the cost; and in constructing the wall he erected an iron pilaster of his building, which was ten inches wide, so that one half of the pilaster stood on each side of the division line; *Held*, that the pilaster was not part of the wall contracted for, and that it was improperly extended beyond the division line. *Id.*

PARENT AND CHILD.See **IMPLIED PROMISE**, 1.**PAROL.**See **CONTRACT**, 9; **HUSBAND AND WIFE**, 2; **EVIDENCE**, 18; **PLEADING**, 23.**PARTIES.**See **CONTRACT**, 5; **DONATION**, 2; **PARTNERSHIP**, 2, 5; **DECREE**, 3; **FORECLOSURE**, 2, 5; **PRINCIPAL AND AGENT**, 4.**PARTITION.**See **JURISDICTION**, 6; **PROBATE**, 3.**PATENT.**See **DONATION ACT**, 5; **TRUSTEEN**, 1.

1. **A PATENT IS PROOF OF REGULARITY OF PROCEEDINGS.**—After a patent has issued, the exhibition of the patent proves the regularity of preliminary proceedings. *White v. Allen*, 103.

2. THE patent gives to the heirs of the settler a different estate from the one possessed by their ancestor. They can encumber, alien or devise it. *Delay v. Chapman, Admr.*, 459.
3. ADMINISTRATOR.—In the estate thus acquired, or to be acquired, by the heirs by purchase, the administrator has no right or interest, and in this case he has right to defend the action. *Id.*
4. HEIRS.—Under the donation law of 1850, upon the death of a settler upon public lands before the expiration of four years continued residence, etc., all *his right* in such lands descend to his heirs, named in such law; and proof of compliance with the requirements of that law up to the death of the settler, entitles those heirs to the patent for the land; and such proof must be made by those heirs, or some one for them.
5. THE right of the settler in such lands at his death was not an absolute fee—it was an estate which he could not convey or encumber by contract or devise, and was not available to his creditors, and not subject to his debts in any way; and this is the estate which under that law is cast upon the heirs.
6. HEIRSHIP.—PURCHASE.—Before a patent can issue when the ancestor died before complying with the donation act, the heirs must make the proofs required—they must get the fee by their own act; and such an obtaining is by purchase, and not by descent.

PAYMENT.

See RAILWAY, 7; REDEMPTION, 4.

PERFORMANCE.

See EQUITY, 7.

PLACE OF TRIAL.

See TRIAL.

PHYSICIAN.

See EVIDENCE, 20.

PLEADING.

- See ABATEMENT, 1; BILL OF REVIEW, 2; COIN, 1, 2, 4; EQUITY, 3, 4; EXPERTS, 1; JURISDICTION, 5; MECHANICS' LIEN, 4, 6; PARTNERSHIP, 6; SET-OFF, 1; SLANDER, 2; STATUTE OF FRAUDS, 2, 5; ANSWER, 1; CLOUD ON TITLE, 1, 2; EJECTMENT, 1; EVIDENCE, 20; JOINDER OF ACTIONS, 1; MARRIED WOMEN, 2; NEGLIGENCE, 1, 2; PRACTICE, 7, 19, 20, 24; SPECIAL DAMAGES, 1.
1. In an action for money due on a contract, the complaint must show that a contract was made between the parties. *Hayden v. Steadman*, 550.
 2. JUDGMENT.—In pleading the judgment of a court of special jurisdiction, it is not necessary to state the facts that confer jurisdiction. *Toby v. Ferguson*, 27.

3. **DEMURRER.**—If a demurrer strikes at the whole of an answer as not constituting a defense, and there is a part of the answer that amounts to a defense, the demurrer will be overruled. *Id.*
4. **MOTION TO STRIKE OUT.**—On a motion to strike out part of an answer, if the motion contains but a single specification, and includes some matters that ought not to be struck out, the whole motion must be denied. *White v. Allen*, 103.
5. **EVIDENCE.**—Evidence ought not to be inserted in, or made part of an answer. *Id.*
6. **ABATEMENT.**—When an answer sets up a defense in bar, and also denies "that the plaintiff is a corporation duly organized," the denial will be stricken out as within the rule established in *Hopwood v. Patterson* (2 Ogn. 49). *Oregon Central R. R. Co. v. Scoggin*, 161.
7. **AMENDMENT.**—Where matters in abatement were plead at the same time with a defense in bar, leave to amend as to the matters in abatement was denied. *Id.*
8. It does not raise an issue of fact to say of a corporation, that it is not duly organized. *Id.*
9. **EXPRESS CONTRACT.**—Where the pleadings admit an agreed price for labor, evidence of its reasonable value is not admissible. *Davis v. Mason*, 154.
10. **SUPPLEMENTARY ANSWER.**—Material facts that did not exist at the commencement of the suit may be set up by supplementary answer. *White v. Allen*, 103.
11. **MALPRACTICE.**—In a civil action for alleged malpractice, when the character of the wound is stated in the answer, and the statement is not disputed by the replication, the plaintiff will not be permitted to prove that the wound was not of the character alleged in the answer. *Williams v. Poppleton*, 139.
12. **WHERE** the plaintiff earned money, under a contract of employment, and was afterwards discharged contrary to the terms of the contract, and he has a claim also for money that has become due since that time under the same employment for time that has run since his discharge, there are not necessarily two causes of action. *Bowman v. Holladay et al.*, 182.
13. **BREACH OF CONTRACT.—JOINDER OF ACTIONS.**—It is not an improper joinder of actions, to unite in the same complaint, a claim for wages, earned under a contract, and a claim for money due under the same contract, for time that has run since the plaintiff was refused employment contrary to the terms of the contract. *Id.*
14. **DENIAL.**—The complaint, in an action for malpractice, contained the following statement: "The fracture was a simple fracture, and one that could easily have been reduced and caused to heal and become strong by a surgeon of ordinary skill, by ordinary diligence and care," and the statement was not denied by the answer: *Held*, that it is admitted that the fracture is a simple fracture, but the statement that the injury could have been cured, etc., is a conclusion, and is not to be deemed admitted. *Boydston v. Giltner*, 118.

15. **REDUNDANCY.**—On motion, redundant matter was stricken out. *Pease v. Hannah*, 301.
16. **DIVORCE.**—In a divorce suit where the pleadings make no reference to the property, the Court cannot render a valid decree transferring from the wife to the children of the parties an estate in fee simple in a particular parcel of land. *Grosblouis v. Northcut*, 394.
17. It is not a sufficient showing of want of jurisdiction to allege that the defendant was insane at the time of the trial. *Norton, Guard., v. Harding et al.*, 361.
18. **PLEAS IN ABATEMENT AND IN BAR.**—In an action to appropriate land to the use of a railroad corporation, the defendant will not be allowed to unite the several defenses in one trial, that the company is not incorporated, the land is not subject to appropriation, and its value is \$200,000. *The Ogn. Cascades R. R. Co. v. The Ogn. Steam Nav. Co.*, 162.
19. It is not sufficient to state, that on a certain day "the plaintiff sold and delivered to the defendant 4,000 lbs. of flour, and that the same was worth \$212." *Bowen et al. v. Emmerson*, 452.
20. In an action for money due upon a contract, facts should be stated showing that a contract existed between the parties, and that it has been broken. *Id.*
21. The complaint should state the promise and the consideration, or facts from which a promise or undertaking upon a sufficient consideration is necessarily inferred; and it should state facts showing that the time of payment has expired, or should show in what respect the contract has been broken. *Id.*
22. **JOINDER OF ACTIONS.**—A contract was alleged to have been made, to convey to the plaintiff "a certain farm, a certain town lot, and twenty hogs," for the consideration of eight hundred dollars, and in an action brought thereon the complaint averred that a deed had been executed for "a part only of the real property," that there was a refusal to deliver the hogs, and that the plaintiff had been damaged thereby in the sum of \$180: *Held*, that the complaint set up but one cause of action. *Banks v. Crow*, 477.
23. **SALE OF LAND.—PAROL.**—Respondent was called as a witness to prove the contract: *Held*, it was error to admit parol evidence of the contract for the sale of land. *Id.*
24. **COMPLAINT.**—An allegation that Mary's river was declared navigable for floating logs " * from Metzger's mill to the farm of William Wood, * " and that said logs were floated on said stream within said points, does not contain any claim of right to float logs over and past the dam at said mill. *Felger et al. v. Robinson et al.*, 455.
25. **CONSTRUCTION.**—The right to float logs between certain points would not justify their doing damage at the terminus. *Id.*
26. **MATERIALITY.**—Whether an allegation is material may be determined by this question: "If it be denied, will the failure to prove it decide the case, in whole or in part?" If it will not, the fact alleged is not material. *Cline v. Cline*, 355.

27. **MATERIAL AVERMENTS.**—The law intends that the pleader should state only material facts. *Id.*
28. **INCIDENTAL POWER.**—Special disposition of the real estate of the parties, although incidental to the subject of the divorce, is within the provisions of the code requiring the complaint to state facts. *GrosLouis v. Northcut*, 394.
29. **AN ANSWER** that states no new fact and contains no denials is not a defence. *Gaston et al. v. McLeran et al.*, 389.
30. **FACTS.**—The complaint must show that a contract was made between the parties, and that it was upon a consideration. *Hayden v. Steadman*, 550.
31. **COLLATERAL UNDERTAKING.**—In case of a collateral undertaking under the statute of frauds, the plaintiff should declare specially. *Id.*
32. **THE COMPLAINT** contained the following statement: "The fracture was a simple fracture, and one that could easily have been reduced and caused to heal and become strong by a surgeon of ordinary skill, by ordinary diligence and care," and the statement is not denied by the answer: *Held*, that it is admitted that the fracture is a simple fracture, but the statement that the injury could have been cured, etc., is a conclusion, and is not to be deemed admitted. *Id.*

PLEAS IN ABATEMENT.

See **MARRIED WOMAN**, 3; **PLEADING**, 6, 7.

1. **JOINDER OF PARTIES.**—In an action on the note of a partnership firm against two defendants, a plea in abatement by one of the defendants that his co-defendant never was a member of the firm, and stating the names of the members of the firm, is not demurrable, as not constituting a defense. *Kamm v. Harker et al.*, 208.
2. **IDEM.—JOINT NOTE.**—One of the makers of a joint note has a right to have the other makers made parties to the action. *Id.*

POLL BOOK.

See **ELECTION**, 3.

POSSESSION.

1. **EVIDENCE OF TITLE.**—Quiet and exclusive possession is evidence of title, until a better title is claimed and shown by another. *The Oregon Cascades R. R. Co. v. The Oregon Steam Nav. Co.*, 178.
2. **DONATION LAW.**—The act of 1850, called the donation law, makes no provision for one dying before the passage of the law—it only provides for the persons *in esse*. Nor did that act enlarge possessory rights. *Covenia et al. v. Hannah et al.*, 465.
3. **TITLE.**—The only title during joint occupancy would be a mere possession, and would extend only to the land actually occupied. *Id.*

POWER.

See **INTERLINEATION**, 2; **PLEADING**, 28.

1. **CORPORATIONS.**—The power to purchase lands was at common law incident to corporations. *Kelly v. Peo. Trans. Co. et al.*, 189.

2. **INCIDENTAL POWER.**—Corporations may do many things incidentally, although the power is not expressly conferred. What is within the spirit and meaning of the statute conferring the power, is within the authority conferred. *Id.*

PRACTICE.

- See **ANSWER**, 1, 2; **APPEAL**, 2, 7; **COMMITMENT**, 3; **CONFESSION**, 1; **CORPORATION**, 4, 33; **CRIMINAL LAW**, 2; **DISCRETION**, 1; **EVIDENCE**, 20, 21; **HABEAS CORPUS**, 1, 2, 3, 4, 5, 6; **INJUNCTION**, 2; **JUDGMENT**, 9; **MANDAMUS**, 4, 8, 10; **MECHANICS' LIEN**, 1, 3; **PLEADING**, 4, 9, 18; **REFEREE**, 1; **SPECIAL PROCEEDING**, 1, 2; **STIPULATION**, 1; **TESTIMONY DE BENE ESSE**, 1, 2; **TRIAL**, 1, 2; **VERDICT**, 4; **VIEW**, 1; **WRIT OF REVIEW**, 5, 6.
1. **PROTEST.**—Money paid into Court by the plaintiff to enable the Court to render judgment for the condemnation of a right of way, in pursuance of the verdict, was, on motion, ordered paid to the defendant, notwithstanding it is accompanied by a protest. *Oregon and Cal. R. R. Co. v. Barlow et al.*, 311.
 2. **WAIVER OF OBJECTION.**—When a view has been had and counsel have accompanied the jury, and knowing the facts, consent to conclude the trial, it is too late after verdict, to raise the point that the jury did not have a full view of the premises. *Oregon Cascades R. R. Co., v. Oregon Steam Nav. Co.*, 178.
 3. **CONFIRMATION OF SALE.**—A mere judgment creditor, who is not a party to the action, cannot appear to oppose the confirmation of a sale. *Miller v. The Oregon City Paper Mfg. Co.*, 24.
 4. **JUDGMENT, HOW SET ASIDE.**—A charge of actual fraud in procuring a judgment by confession, should not be finally determined on motion and affidavits. *Id.*
 5. **JURY IN AN EQUITY SUIT.**—Stockholders of a corporation sued the directors and the corporation, charging fraud and mismanagement; a jury was empanelled to pass upon the question whether there had been gross mismanagement on the part of the directors, and on the question whether the directors had been guilty of actual fraud. *Hedges v. Pugett*, 77.
 6. **TRANSCRIPT OF DOCKET.**—Where a transcript on appeal from a justice's court was filed, and was treated as a transcript filed with the county clerk to authorize the judgment to be docketed in the circuit court, and an execution was issued out of the circuit court, the execution was set aside on motion. *Chapman v. Raleigh*, 34.
 7. **CIRCUMSTANTIAL EVIDENCE.**—When the action was for an agreed price, and the evidence was conflicting as to whether that price was agreed to, the actual value of the property sold was admitted as a circumstance tending to disprove the alleged agreement. *Brown v. Cahalin*, 45.
 8. **IDEM.**—Proof of the state of accounts was admitted as circumstantial evidence, tending to contradict a claim of payment by a release of prior indebtedness. *Id.*

9. **APPEARANCE.**—Withdrawing defendant's appearance does not oust jurisdiction of the person. *White v. Thompson et al.*, 115.
10. **WITHDRAWAL OF PART OF CAUSE OF ACTION.**—The verdict of the jury was, "We, the jury find that the town lot in the town of Oakland, Douglas County, Oregon, designated in the plaintiff's complaint, is the property of plaintiff, and further, we, the jury, find for the plaintiff ninety-four dollars:" *Held*, that the town lot had not been withdrawn from the case, and that its sale forming a part of the parol agreement, rendered the contract void. *Banks v. Crow*, 477.
11. **VARIANCE.**—If the plaintiff seeks to recover on a contract essentially different from the one set up, he should obtain leave to amend. *Id.*
12. **ACTION TO CONDEMN LAND FOR A RAILROAD.**—Where the plaintiff sues to condemn sixty feet in width, he will not be allowed to give evidence of the value, and ask a verdict for the condemnation of forty-five feet in width. *Oregon Cascades R. R. Co. v. Oregon Steam Navigation Co.*, 164.
13. **RIGHT OF WAY.**—In an action to obtain a right of way for a railroad, the defendant set up that the plaintiff was not incorporated, that the land was not subject to appropriation for such purpose, and that it was of the value of \$200,000. It was held that the plaintiff would not be compelled to try all the issues at the same time. *Id.*
14. **CONSENT.**—The parties may consent to try the two latter issues together. *Id.*
15. **VIEW.**—Duties of jurors in viewing premises, stated. *Id.*
16. **COUNTER AFFIDAVITS.**—On a motion to open a decree under sec. 57 of the Code, counter affidavits may be filed. *Smith v. Smith*, 363.
17. **SERVICE BY PUBLICATION.—MOTION TO OPEN A DECREE.**—The circumstances that an affidavit to obtain an order of publication of summons, was made upon information only, and that it did not show what effort had been made to learn the defendant's residence, may be considered on a motion, for leave to answer after default and decree. *Id.*
18. **By the summons it appeared that the court was held in Couch precinct in Multnomah county. In the return, the constable described himself as "constable of Couch precinct," without naming the county. The return was held sufficient. Maroonney v. McKay**, 372.
19. **A COPY of the complaint certified by the justice of the peace, and served with the summons, is sufficiently certified. Id.**
20. **AVERMENTS in the answer not presenting issuable facts will be struck out on motion. Holbrook et al. v. Page**, 374.
21. **REDUNDANCY.**—Express admissions of facts alleged in the complaint are unnecessary, and may be struck from the answer as redundant. *Id.*
22. **MOTION TO STRIKE OUT.**—Where a part of that to which a specific objection is pointed is properly pleaded, the objection will not be sustained. *Id.*

PRESUMPTION.

See DECREE, 5; EVIDENCE; HOMICIDE, 1, 2, 3; PROBATE, 1, 2.

PRINCIPAL AND AGENT.

1. CORPORATION LIABLE FOR NEGLIGENCE OF AGENT.—A corporation is liable to the injured party for damages caused by the agent of the corporation in carelessly firing a signal gun from the corporation's ship, although the agent acted contrary to instructions as to the manner of firing. *Oliver v. North Pacific Trans. Co.*, 84.
2. PRINCIPAL LIABLE, WHEN.—If an agent abandon his principal's business and do something not pertaining thereto, the agent or actor is alone liable. But if he do his principal's business in a careless manner which he was directed to do in a careful manner, the departure from orders will not exonerate the principal. *Id.*
3. BURDEN OF PROOF.—AGENT MUST DISCLOSE AGENCY.—If the defendant pleads that he made the contract as agent of another, and not as principal, and issue is joined, it devolves on the defendant to show that he so contracted, and that the plaintiff had notice of the agency. *McCall v. Elliott*, 138.
4. AGENT.—P. being sued for the rent of an undivided interest in a water ditch, answered that he was in possession only as the agent of M. The jury found a general verdict for the plaintiff, but also found a special verdict that P. was in possession as agent of M. It was error to hold P. personally liable to the plaintiff for rents due on the ditch. *Stewart v. Perkins*, 508.

PROBATE.

1. COUNTY COURT.—JURISDICTION.—The county court is to be regarded in probate proceedings as a superior jurisdiction; it being a court of record deriving its power as a probate court from the constitution. And when its order for the sale of real and personal property of deceased persons appear to have been regularly made, reciting all the jurisdictional facts necessary to authorize the order, no presumption will be indulged against the recitals, and extrinsic evidence of their truth is not necessary, but the burden of showing that the court has not acquired jurisdiction is on the party who disputes the truth of the recital. *Russell v. Lewis*, 380.
2. ORDER OF SALE.—MISTAKE IN DATE.—PRESUMPTION.—The order of sale recited notice to all persons "to appear on this day;" an order to show cause was made returnable on the fifth of April, but the heading of the order of sale was, "at a term of the court began and held on the first Monday, the fourth of April," etc.: *Held*, that a mistake in making up the record will be presumed, rather than that the order was made before the return day. *Id.*
3. PROBATE SALE.—INFANT HEIR A NECESSARY PARTY.—*Held*, that a sale of a decedent's real estate to pay debts by virtue of an order of the probate court, under the statute (1855), is void as to an infant heir not made a party to the proceeding, and for whom no guardian was appointed. Such proceedings are hostile to the heirs, who are necessary parties, and

the probate court must have jurisdiction of the persons (as well as the subject matter) in the manner provided for in the statute, or the sale will be void. *Fisk v. Kellogg*, 503.

PROCESS.

See EXECUTION, 6; HABEAS CORPUS, 1; JURISDICTION, 2; WARRANT OF ARREST, 1.

1. POWER OF THE COURT OVER PROCESS.—Every court has power to control its own process, and prevent its abuse. *Provost v. Millard*, 370.

PROMISSORY NOTE.

See ASSESSMENT, 1; BILLS AND NOTES.

PURCHASE.

See CORPORATION, 24; PATENT, 4.

RAFT.

See NAVIGABLE STREAM.

RAILWAY.

See PRACTICE, 12.

1. RIGHT OF WAY.—The amount to be paid for the land appropriated for a railway should be its value at the commencement of the action. *Oregon & Cal. R. R. Co. v. Barlow et al.*, 311.
2. THE estimate should not include the value of timber on the defendants, adjacent lands, cut down and destroyed by the plaintiff. *Id.*
3. DANGER FROM FIRE.—If a railroad is to be constructed so near to the defendants' barns as to improperly expose them to danger from fire from passing trains, that is a proper subject to be considered by the jury in estimating damages. If the danger is such as to render it advisable to remove the barns, the cost of removal is a proper subject to be considered by the jury in estimating damages. *Id.*
4. PONDING WATER.—If, by an improper construction of the railroad now built, the road bed acts as a dam and improperly ponds water and causes it to overflow the defendants' lands, their remedy is by a proceeding to prevent or remove the obstruction, and it is not a ground for additional damages in this proceeding. *Id.*
5. THE damages to be assessed are such as will result from a proper construction of the road. *Id.*
6. If a proper construction of the road will pond water upon the defendants' adjacent land, the overflow is a proper subject to be considered in estimating damages. *Id.*
7. PROTEST.—Money paid into court by the plaintiff to enable the court to render judgment in pursuance of the verdict, was, on motion, ordered paid to the defendant, notwithstanding it is accompanied by a protest. *Id.*

8. **LIABILITY OF CORPORATION'S PROPERTY TO CONDEMNATION.**—In general, property held by a corporation and necessary to the public use for which the corporation is created, is not liable to be condemned and appropriated to another corporation for the same use. A greater public necessity may authorize a new appropriation, as for instance where it is necessary for one railway to cross the track of another. *Oregon Cascades R. R. Co. v. Oregon Steam Nav. Co.*, 164.
9. **NEITHER** a railway company, nor the owner of land adjacent to the railway, is required by law to fence the line between them. Each is left by the law to fence or not, as the interest of each shall prompt it or him. *Oregon Central R. R. Co. v. Wait*, 91.
10. **THE** defendant is entitled to the actual value of the land appropriated; and if injury resulting from constructing the road will exceed the resulting benefits, the excess of such injury is to be added to the value of the land appropriated. *Id.*

RATIFICATION.

See **ASSIGNMENT**, 1.

REAL ACTION.

See **EJECTMENT**.

RECEIPT.

1. **EXPLAINED BY PAROL.**—Parol evidence of the surrounding circumstances is admissible to show that a particular cause of action is not included in a general receipt. *Williams v. Poppleton*, 139.
2. **MISTAKE IN A RECEIPT.**—When a settlement has taken place and written receipts have been given, if an item has been omitted by mistake, the mistake may be proved by parol; but if the item was thought of at the time by both parties or by the party who objects to the settlement, a receipt in full must be held to include the item. *Id.*

RECEIVER.

1. **APPOINTMENT OF A RECEIVER.**—The Court refused to appoint a receiver, where it was not shown that there was danger that the partnership property will be ultimately lost. *Wellman et al. v. Harker et al.*, 253.

RECORD.

See **CONFESSION OF JUDGMENT**, 1, 2; **WRIT OF REVIEW**, 4.

1. **JUDGMENT.—CERTAINTY.**—When a judgment is rendered, the record should show unequivocally what matters have been adjudicated. *Dray v. Crich*, 298.

REDEMPTION.

1. **ESTOPPEL.**—Where A., who was mortgagor, having a right to redeem, took from B., who was assignee of a mortgage in possession, a lease

- from month to month of the mortgaged premises, A. agreeing to pay a monthly rent, "and to quit and give up possession of said premises upon demand at the end of any month;" *Held*, that he was not estopped to set up his right to redeem; and that it is not a necessary inference from the transaction that the parties intended to convert B's claim into a legal title. *Atkinson v. Morrissey*, 332.
2. **TENDER.**—In general a mortgagor cannot claim redemption without a tender of the debt. But a distinction is made in cases where the debt or duty is wholly uncertain, and cannot be ascertained but by the judgment of the court. *Id.*
 3. **EQUITY JURISDICTION.**—Where the principal object of a suit is to determine a controverted question as to whether an equity of redemption exists, the controversy is sufficient to afford ground of equity jurisdiction. *Id.*
 4. **TENDER.**—Where the defendant refused to accept money from the plaintiff, and placed his refusal on the ground that the plaintiff had no right to redeem, the bill was sustained, although the plaintiff had neither made a formal tender, nor brought money into court. *Id.*
 5. **IMPROVEMENTS.**—Where the mortgagee in possession had placed valuable improvements on the land, the plaintiff consenting that it should be done at his expense, the cost of the improvement was added to the amount otherwise due to the mortgagee. *Id.*

REFeree.

1. **POWER OF.**—It is the intention of the statute, that trials before a referee proceed in the same manner as trials before a court, and that referees are clothed with the same authority in directing the manner of a trial, and in deciding motions which may arise during its progress. *Stimson v. Estes et al.*, 521.

REGISTER OF LANDS.

1. **THE** register of state lands for the La Grande District, acts within said district simply as the agent or sub-commissioner of the board of school land commissioners. *Anderson v. Laughery*, 277.
2. **IDEM.**—He cannot render such a decision, judgment or decree as can be appealed from to the circuit courts. *Id.*

REPEAL.

See JUDGMENT LIEN, 2; STATUTE, 1.

1. **RE-ENACTING** the law fixing the salary of the county treasurer, does not deprive him of the right to a percentage for receiving school funds allowed to him by a statute not referred to in the re-enactment. *Chatfield v. Washington County*, 318.

RESIDENCE.

1. **EMPLOYEES OF THE GOVERNMENT.**—Although residence cannot be gained or lost by reason of the person's presence or absence, while employed in

the service of the United States, yet one so employed may change his residence. *Darragh v. Bird*, 229.

2. EVERY person must have some fixed place of residence, or must labor under a disability that neither the law nor the courts can relieve. The mere passing in and out of a precinct will not establish a residence, although the persons occupation may be such as to make it inconvenient to vote at any other place, or if he has no fixed place of residence. *Id.*
3. AN intention to move immediately after the election, does not amount to a change or loss of residence; there must be a union of act and intention. *Id.*
4. THOUGH an employee of the United States or State government cannot "gain or lose a residence by reason of his presence or absence while employed in the service," yet he can establish his domicile, and gain a residence, at such a point as he may desire, by taking the appropriate steps to do so, independently of his employment. *Wood v. Fitzgerald*, 568.

RESTITUTION.

See EQUITY, 2.

RETURN.

See PRACTICE, 17; WRIT OF REVIEW, 4.

RIGHT OF WAY.

See ANSWER, 2; CORPORATION, 24, 33; RAILWAY, 8, 10.

RIPARIAN PROPRIETOR.

See FERRY, 2, 3; NAVIGABLE STREAMS, 2, 6.

SALE.

See REDEMPTION, 1; LICENSE, 2.

REVIEW.

See WRIT OF REVIEW; BILL OF REVIEW.

SALE OF LAND.

1. EQUITABLE RELIEF.—The cases in which courts of equity interfere to give relief, where the land exceeds or falls short of that which is specified in the deed or contract of sale, are those in which the sale of land has been made by the acre or foot, or where there has been fraud or wilful misrepresentation. *Failing et al. v. Osborne*, 498.

SCHOOL FUNDS.

1. OUTSTANDING WARRANTS.—Where there are outstanding warrants against a school district, the clerk may pay those first presented. It is not

necessary that the money of each year be exclusively applied to pay for schools taught during the year in which it was levied. *Howard v. Bamford*, 565.

SELF-DEFENSE.

See EVIDENCE, 6, 7.

1. JUSTIFICATION.—One may use all necessary force to prevent a forcible entry into his house, but he has no right to use unnecessary force; and if he unnecessarily follow and shoot the party, after he has ceased to attempt to enter, the attempt forms no justification. *State v. Conally*, 69.
2. THE law of self-defense does not justify one in following up his adversary after the immediate danger has ceased. *Id.*

SET-OFF.

See COSTS, 4; PLEADING, 16, 17.

1. PLEA OF FORMER ACTION.—The action was for merchandise sold to the value of \$432.40, and money advanced to the amount of \$107.80. The defendant answered, denying the allegations of the complaint, and stating that he had, in an action against the present plaintiff, given him credit for \$343 of the claim now made: *Held*, that it was error to instruct the jury that the complaint in the former case did not allege that the then defendant had consented to the set-off; and that if there was no other defense than the former action, the plaintiff in this action was entitled to recover the value of the goods sold and delivered by him. *Kafka v. Simon*, 555.

SETTLEMENT.

See CONSIDERATION, 3; DONATION ACT, 1.

SHERIFF.

See EXECUTION; FEES, 1; MILEAGE, 1.

1. WHEN a former sheriff is served with a certificate, in pursuance of section 983 of the code, his powers cease, and a contest pending does not stay the effect of serving the certificate. *Warner v. Myers*, 218.

SLANDER.

1. SLANDER.—Slanderous words charging an heinous crime, are actionable of themselves. *Sharple v. Hutchinson*, 337.
2. MAY PLEAD THE TRUTH.—If the words spoken were true, their truth is a plea the defendant has a right to make, and he cannot be blamed for setting it up. But he must take the risk of its truth if he sets it up. *Id.*
3. DAMAGES.—If the charge was false, repeating it in the answer is repeating the slander; and is in that case a circumstance proper to be considered by the jury in determining the amount of damages. *Id.*

SPECIAL DAMAGES.

1. An allegation that the plaintiff could have earned five or seven dollars per day in hauling grain under a specified contract, is not a sufficient averment to warrant special damages thereon. It does not show that he might not have earned an equal or greater amount, during the same time, elsewhere. *Brown v. Moore*, 435.

SPECIAL PROCEEDINGS.

See ANSWER, 2; ELECTION, 4; MECHANICS' LIEN, 1, 3; TRIAL, 1, 2.

1. JUDGE.—The import of the words the judge "shall make all necessary orders for the trial of the case and carrying his judgment into effect," is to give the judge at chambers power to do whatever the court could do in term time. *Myers v. Warner*, 212.
2. TIME OF HEARING.—The plaintiff having named a day for the hearing, his motion for an earlier day was denied. *Id.*
3. CONTESTED ELECTION.—In a special proceeding, to contest an election, under sections 37 and 38 of the act relating to elections, the notice is the commencement of the proceeding, and the court acquires jurisdiction by its service and return. The court has no jurisdiction to hear any motion in the case until the return. A notice that does not state a definite time for the hearing is of no avail. *Id.*
4. *IDEM.*—When the time stated in a notice, is "at the next term of the Circuit Court of said county, or as soon as said judge will hear the same," the indefinite words may be rejected as surplusage. *Id.*

STATEMENT.

See APPEAL, 2.

STATUTE.

See CONSTRUCTION, 2; FEES, 4; JUDGMENT LIEN, 2; MECHANICS' LIEN, 3; TIME, 1.

1. ENACTMENT AND REPEAL.—When the legislature seeks to repeal an act or to limit its territorial application, it is not necessary to set forth the entire act or section, as in cases of revision or amendment. *Bird v. County of Wasco*, 282.

STATUTE OF FRAUDS.

See PLEADING, 23.

1. To bring a contract within the Statute of Frauds, relating to parol agreements not to be performed within a year, it must appear to be necessarily incapable of performance within that time. *Hedges v. Strong, Adm'r.*, 18.
2. WHERE the statute declares a promise void unless in writing, it is not necessary to allege in the complaint that the promise is in writing. *Id.*

3. **NEW CONSIDERATION.**—It is not necessary that the promise should be in writing, where the promise to pay the debt arises out of some new and original consideration of benefit moving between the newly-contracting parties. *Id.*
4. **WHERE** a promise to pay a debt is founded on a new and original consideration of benefit to the promiser, the subsisting liability of the original debtor is no objection to the recovery. *Ludwick v. Watson*, 256.
5. **COLLATERAL UNDERTAKING.**—In case of a collateral undertaking under the Statute of Frauds, the plaintiff should declare specially. *Hayden v. Steadman*, 550.

STIPULATION.

1. In construing a stipulation filed in the cause, the intention of the parties is to be determined from the language used in the written stipulation. A stipulation that the party was divorced in a designated suit is, in effect, an admission that the court had jurisdiction to grant the divorce. *Gros-louis v. Northcut*, 394.

STREET.

See **DEDICATION**, 1.

1. **CITY COUNCIL.**—If the *locus in quo* is a street, an order of the city council directing it to be fenced up is void. *City of Portland v. Whittle*, 126.

SUFFRAGE.

See **ELECTION**; **PARDON**, 1.

SUMMARY PROCEEDINGS.

See **SPECIAL PROCEEDINGS**.

SUMMONS.

See **PRACTICE**, 16; **PROCESS**.

SUPERVISOR.

See **HIGHWAY**, 1.

SUPPLEMENTARY ANSWER.

1. **THERE** is a clear distinction between a supplementary answer and an amendment that sets up a defense which was in existence at the time of the original answer. *Holladay et al. v. Elliott et al.*, 340.

SUPPLEMENTARY PROCEEDINGS.

See **EXECUTION**.

TAXES.

See **EXECUTOR**, 1; **ASSESSMENT**, 1, 2.

1. **PLACE.**—Intangible property, not growing out of real estate, must be

- held to follow the person of the owner. *Johnson et al. v. City Council of Oregon City*, 13.
2. Its locality does not depend upon the place of the written evidence of the ownership. *Id.*
 3. NOTES and other choses in action belonging to citizens resident in Oregon City, are liable to taxation under the charter of Oregon City. *Id.*
 4. ASSESSMENT.—COUNTY COURT.—The county court has no jurisdiction or authority to correct errors made by the assessor in the valuation of property. *Shumway et al. v. Baker County*, 246.
 5. IDEM.—The proper tribunal by which such corrections are made is composed of the assessor and county clerk. *Id.*

TENANTS IN COMMON.

See EJECTMENT, 1, 2; PARTY WALL, 1.

TENDER.

See REDEMPTION, 2, 4.

TESTIMONY DE BENE ESSE.

1. NOTICE.—The petition in a proceeding to perpetuate testimony, is addressed to the discretion of the court or judge; and under peculiar circumstances notice to the adverse party was required. *Carler v. Pease*, 493.
2. THIS proceeding should not be resorted to merely to ascertain what an adverse witness will testify. *Id.*

TIDE.

See NAVIGABLE STREAM, 9.

TIME.

See CRIMINAL LAW, 3; PROBATE, 2; MECHANICS' LIEN, 1, 2.

1. IDEM.—The times of holding the circuit courts in the third, fourth and fifth districts, are not changed by the act of 1870. *Smith v. Smith*, 363.
2. ORDER ENLARGING TIME.—An order enlarging the time within which the statement of facts is required to be made and served, must be made within the time prescribed by law for the performance of these requirements. *Seely v. Sebastian*, 563.

TITLE.

See CORPORATION, 15; COSTS, 1; DONATION ACT, 5; EJECTMENT, 1; PATENT, 4, 6; POSSESSION, 1; POWER, 1; WARRANTY, 1.

1. CORPORATION.—DISABILITY.—It has been held that where lands have been purchased by a corporation that was not authorized to hold the premises, and by the corporation conveyed to a third party, a good title passed by the conveyance. *Kelly v. People's Trans. Co.*, 189.

TREATY.

See POSSESSION, 2, 3.

1. ARTICLE III of the treaty of 1846 between the United States and Great Britain, construed, that neither power intended in any way to dispose of the soil or embarrass the right of eminent domain. *Cowenia et al. v. Hannah et al.* 465.

TRESPASS.

See DAMAGES; NEGLIGENCE, 3; NAVIGABLE STREAM, 3; RAILWAY, 2.

TRIAL.

See PRACTICE; PLEADING, 18; REFEREE, 1; VIEW, 1.

1. EVIDENCE.—The plaintiff, in an action to obtain a right of way, was not permitted to go into a general exhibit of the defendant's corporate transactions and rates of charge, to show that the defendant was claiming the land solely for the purpose of monopoly or to prevent competition. *The Oregon Cascades R. R. Co. v. Oregon Steam Navigation Co.*, 164.
2. In an action to condemn lands to the use of a railroad company, when the issue is formed by a statement in the complaint that the defendant's damages do not exceed the sum of two hundred dollars, and a statement in the answer that the land sought to be appropriated is of the value of \$234, and that the additional damages to the defendant resulting from such appropriation will amount to \$2,516, the defendant was permitted to open and close the case. *Oregon and California R. R. Co. v. Barlow*, 311.

TRUSTEE.

See CONVEYANCE, 1.

1. PATENT TO A WRONG PARTY, NOT VOID.—Where equity relieves from the effect of issuing a patent to a wrong party, the patent is held to be effective to pass the title from the United States, but the patentee is held to be a trustee for the benefit of the rightful claimant. *White v. Allen*, 103.

UNDERTAKING.

See APPEAL, 6.

USURY.

1. CONSTRUCTION.—It seems more consonant with rules of construction, to hold a stipulation for reasonable attorney's fees, in case of suit, to refer to the fees given by statute, than to hold that the parties have by such stipulation rendered a contract usurious, which would otherwise have been innocent. *Gaston v. McLearn*, 389.
2. PLEADING.—An answer setting up usury, must aver clearly every particular necessary to establish the usury charged, and must distinctly negative every supposable fact which, if true, would render the transaction innocent or lawful. *Id.*

VACANCY.

1. APPOINTMENT TO OFFICE.—The appointee of the Governor to fill a vacancy in office occasioned by death or resignation, only holds said office until the first general election after the vacancy occurs. At that time the people may supply the office by election. *State ex rel. Whitney v. Johns*, 533.

VACATION.

See JUDGMENT, 9.

VENDOR AND PURCHASER.

See DEED; SALE.

VENDOR'S LIEN.

1. A MORTGAGE is a more certain security than a vendor's lien, and under our laws, the taking of a mortgage for the purchase money, is a waiver of the vendor's lien. *Pease, Adm'r. v. Kelly et al.*, 417.
2. A VENDOR's lien exists in case there is no higher security. *Id.*
3. BOTH the lien of a mortgage and a vendor's lien cannot exist at the same time. *Id.*

VERDICT.

See JUROR, 3; NEW TRIAL, 14.

1. WHERE the verdict was such as to show that the jury did not intend to find a general verdict, and the court in rendering judgment treated it as a general verdict, the judgment was set aside. *Dray v. Crich*, 298.
2. IN an action for malpractice the jury should not compromise upon a verdict that is not in accordance with their convictions. *Boydston v. Giltner*, 118.

VIEW.

See PRACTICE, 2.

1. DUTIES of jurors when ordered to view premises. *The Oregon Cascades R. R. Co. v. The Oregon Steam Nav. Co.*, 164.

WARRANT OF ARREST.

1. ARREST IN CIVIL CASES.—The jurisdiction to issue summary process of arrest in civil cases is made to depend on the affidavit. *Norman v. Zeiber, Sheriff*, 197.
2. IDEM.—When no affidavit is made, or that which is made does not present a legal foundation for the issuing the writ, the writ and all proceedings under it are void. *Id.*
3. UNDER section 107 of the Code it is not necessary that all the jurisdictional facts should be recited in the warrant of arrest. If these facts appear in some anterior part of the record, it is sufficient. *Id.*

4. FRAUD.—Authority to arrest for fraud under section 107 of the Code, is limited to the kinds or classes of fraud there designated. *Id.*

WARRANTY.

See CONTRACT, 10; COVENANT, 1.

1. ONE who is bound by a covenant of general warranty can not set up an after acquired title. *Taggart v. Risley*, 306.

WATER.

See NAVIGABLE STREAM, 2; RAILWAY, 4, 6.

1. ONE may not so use his own property as unreasonably to discommode another. *Oregon Iron Co. v. Trullinger*, 1. ✓
2. RIGHT TO POND WATER.—The right to use water necessarily implies a right to detain it. One exercising this right can only *detain* it. He can not divert it. *Id.*
3. HE must not detain it unreasonably, or let it off in unreasonable quantities. *Id.*
4. WHAT is unreasonable detention is, in general, a question of fact. *Id.*
5. SERVITUDES.—The purchaser of part of an estate takes it with the servitudes that are visibly attached at the time of the sale. *Id.*

WRITING.

See PAROL; STATUTE OF FRAUDS, 4.

WRIT OF REVIEW.

See COMMITMENT, 3; CONSTITUTION, 1; DOCKET, 1; HABEAS CORPUS, 1, 2, 3, 4, 5.

1. THE expiration of a right to appeal as to time, does not extinguish the right to review. *Schiroff et al. v. Phallippi et al.* 484.
2. THE statutory appeal and writ of review are concurrent remedies. *Id.*
3. THE appeal involves a trial both upon the merits and upon the law; the review, only questions of law. *Id.*
4. THE court refuses to re-hear the witnesses previously examined before the committing magistrate, although the testimony had not been reduced to writing. *Fleming v. Bills, Sheriff*, 286.

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